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Issue Date: 01 October 2003

CASE NO.: 2001-BLA-984

IN THE MATTER OF:

GREGORY ELLIS PROFFIT, Son of
CHARLIE PROFFIT (Deceased Miner)

Claimant

v.

MEADOWS COAL COMPANY/
JEWELL RESOURCES

Employer

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS

Party-in-Interest

DECISION AND ORDER DENYING BENEFITS

This matter involves a request for modification of a denial of benefits pursuant to a living miner's claim filed by Charlie Proffit (Miner) and a claim for survivor's benefits filed by Miner's son, Gregory Ellis Proffit (Claimant) under Title IV of the Federal Coal Mine and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1977 (the Act), 30 U.S.C. § 901, et seq., and the regulations thereunder at Title 20 of the Code of Federal Regulations (CFR).[1] Benefits are awarded to persons who are totally disabled within the meaning of the Act due to coal workers' pneumoconiosis (CWP), or to survivors of persons who died due to pneumoconiosis, a dust disease of the lung which arises from coal mine employment and is commonly known as black lung.

[1] On December 12, 2000, U.S. Department of Labor (DOL) consolidated the claims. (DX-160).

The parties agree this matter may be resolved based on a stipulated record. The record, which is primarily composed of medical reports and documentation related to a Decision and Order and subsequent modification request involving a deceased miner, supports the parties' contentions that a resolution may be made on a stipulated record.

The District Director submitted 177 exhibits, including the exhibits previously considered in the prior Decision and Order, a transcript and pleadings related to the prior Decision and Order and post-Decision and Order medical evidence, pleadings and correspondence. Director's exhibits are hereby received as DX-1 through DX-177. Employer submitted four exhibits, including: (1) a Table of Coal Mine Industry Average Earnings, (2) a September 24, 2001 report by Dr. Peter G. Tuteur and curriculum vitae, (3) a February 22, 2002 report by Roger J. McSharry and curriculum vitae, and (4) an April 25, 2002 report by Dr. James R. Castle and curriculum vitae. Employer's exhibits are received as EX-1 through EX-4. Claimant submitted two exhibits, namely: (1) a recent medical report by Dr. German Iosif and (2) Dr. Iosif's curriculum vitae and Claimant's affidavit providing evidence on dependency issues. Claimant's exhibits are received as CX-1 and CX-2. The parties submitted one joint exhibit, which is received as JX-1. Exhibit 610 of the Office of Worker's Compensation Programs Coal Mine (BLBA) Procedure Manual is received as ALJX-1.[2]

I. STIPULATIONS

On August 27, 2003, the parties agreed (JX-1) that:

1. The hearing of August 26, 2003 should be cancelled.

2. The record should be closed on August 26, 2003 in regard to receiving any additional evidence from the parties.

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[2] Pursuant to 20 C.F.R. § 725.101(a)(32)(iii)(2002), a copy of the table "shall be made a part of the record" if used by an adjudicating officer to establish the length of a miner's work history. Although the Board in Clark v. Barnwell Coal Co., BRBS Nos. 01-8676 BLA and 02-280 BLA (April 30, 2003) declined to decide whether the definition in the new regulation applies to matters arising under the former regulations, the Fourth Circuit, in Armco, Inc. v. Martin, 277 F.3d 468, 476 (4th Cir. 2002), has held that the new regulations regarding length of coal mine employment clarify the meaning of the prior regulations, as discussed below.

3. Closing arguments were due on or before September 19, 2003.

4. Evidence as to the issue of Claimant's status as an eligible dependent surviving child would be provided by affidavit of James E. Proffit, legal guardian of Claimant.

5. The Director, OWCP, had no additional evidence to offer beyond what is already contained in the Director's Exhibits transmitted to OALJ.

6. James E. Proffit has no additional information to offer as to the coal mine employment of Charlie Proffit, the deceased coal miner, beyond what is already in the record, including the testimony of Charlie Proffit given during a previous hearing in this case.

7. Gregory E. Proffit is a surviving child of Charlie Proffit who continues to meet the dependency requirements of the regulations, namely that Gregory E. Proffit has never been married; just turned 18 years of age on July 9, 2003; and remains a full-time student (Senior at Randall High School in Amarillo, Texas) with an anticipated graduation date of May 2004.

II. ISSUES

Although a number of issues have been recited by Employer and Director, the issues germane to a resolution of this matter include:

1. Responsible Operator

2. Whether Miner established the existence of coal workers' pneumoconiosis.

3. Whether Miner's pneumoconiosis, if proved, was caused by his coal mine employment.

4. Whether Miner proved he was totally disabled due to pneumoconiosis.

5. Whether Claimant established he is an eligible survivor under the Act.

6. Whether Claimant established Miner suffered from pneumoconiosis.

7. Whether Claimant established Miner's pneumoconiosis arose, at least in part, out of coal mine employment.

8. Whether Claimant established Miner's death was due to pneumoconiosis.

III. STATEMENT OF THE CASE

Because Miner and Claimant filed their applications for benefits after March 31, 1980, Part 718 of Title 20 of the CFR applies. 20 C.F.R. § 718.2. This claim is governed by the law of the Fourth Circuit of the United States because Miner was last employed in the coal industry in Virginia. See Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989)(en banc).

A. Miner's and Claimant's Backgrounds

Miner was born on May 22, 1933, and worked for Employer in various digging and tunneling activities from 1976 until 1978. (DX-1; DX-4). Thereafter, he worked for Dominion Coal Company (Dominion) in 1978, Bounty Mining Corporation (Bounty) for periods of time from December 1978 through February 1980, Branch Group (Branch) in 1978, Scottsdale Coal Company, Inc. (Scottsdale) in 1979, and Fray Mining, Inc. (Fray) from March 31, 1980 through December 22, 1980.[3] (DX-4).

Claimant was born on July 9, 1985 and reached 18 years of age on July 9, 2003. His parents were Miner and Miner's wife, Ms. Ruby Joyce Thacker (Ms. Thacker).[4] (DX-150). He is currently in high

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[3] Dominion, Branch, and Scottsdale are not parties to the instant matter. Likewise, Fray and Bounty, which were dismissed by DOL on December 7, 1995, are no longer parties to the instant matter; however, on June 4, 1996, DOL notified Bounty's carrier, which purportedly provided coverage to Fray and Bounty, that it continued to be a party to the matter pending further development. (DX-59; DX-78; DX-79).

[4] It should be noted Miner had another son, James Proffit (whose mother and date of birth are not identified in the record), and one step-child, Franklin Lee Compton, Jr. (Compton), born on March 10, 1981. Compton lived with Miner since he "was approximately one month old." James Proffit was ostensibly substantially older than Claimant and Compton because he lived in Texas and was awarded permanent physical custody of Claimant and Compton, who moved from Virginia to live with James Proffit in Texas, pursuant to a July 31, 1997 Virginia divorce decree. (DX-

school and will not graduate until May or June 2004. (Claimant's Brief, p. 3).

Ms. Thacker, who has not pursued a survivor's claim, divorced Miner on July 31, 1997.[5] The divorce decree incorporated a post-nuptial agreement which provided that, in the event an action for divorce or separate maintenance should arise, no party shall institute an action for money, support, or maintenance. However, the post-nuptial agreement provided for the apportionment of Miner's Black Lung Benefits check. (DX-113, pp. 3-4).

B. Procedural Background

1. Living Miner's Claim

On February 8, 1994, Charlie Proffit (Miner), who was born on May 22, 1933, filed his living miner's claim, which would eventually be assigned an OALJ docket number of 1997-BLA-1899. (DX-1; DX-8; DX-121). As of the date of filing, Miner's wife was Ms. Thacker, who he married on July 16, 1982. He was previously married to Carron Boyde, who he divorced.[6] He reported that he became disabled in 1980 after 15 years of work in or around coal mines.

He identified Fray as his employer. (DX-1; DX-8). Miner reported he last worked for Bounty from 1978 to 1980. (DX-2). He

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106). Neither Compton nor James Proffit have asserted an individual interest in this matter.

It should also be noted that the 1997 divorce decree that awarded custody of the children to James Proffit provided "neither [Ms. Thacker] nor [Miner] shall be required to pay child support at this time since both children are receiving sufficient income from other sources." (DX-106, p. 4).

[5] At the February 3, 1998 hearing, the ALJ noted Ms. Thacker failed to appear at the hearing, but submitted **pro se** a portion of her post-nuptial agreement indicating Miner provided for her interest in any potential benefits awarded. The ALJ received her letter and the excerpts of the post-nuptial agreement to preserve a record of Ms. Thacker's effort to reserve rights in the matter. Her status was to be resolved at a later time at the District Director level. (DX-107; DX-108; DX-113; DX-115, pp. 8-17).

[6] Carron Boyde is not a party in this matter.

described his most recent work as "utility work shoveling coal after a continuous miner [sic], install timbers, haul supplies [and] clean belt haulage." He reported working for the following employers: Bounty (1978-1980), Scottsdale (1978), Fray (1979-1981), Mark Allen Coal Co. (1966-1968), Baron Coal Co. (1961), Youngs Branch Coal Co. (1969), Jewell Ridge Coal Corp. (1971-1976), Webb Coal Co. (1952), and Employer (1976). (DX-6).

Miner's Social Security Itemized Statement of Earnings (SSA records) indicate he earned income solely through his work with Jewell Ridge Coal Corporation (JRC)[7] from the third quarter of 1971 through the second quarter of 1976. In the third and fourth quarters of 1976, he earned $1,106.06 and $52.40, respectively, from JRC and $248.00 and $3,909.95, respectively, from Employer. Miner's 1977 earnings of $14,729.44 were derived exclusively from his work with Employer in all four quarters of the year. Id.

In 1978, 1979, and 1980, when his SSA records do not apportion earnings by quarter, Miner earned income from several sources. In 1978, he earned $7,843.11 from Employer, $124.00 from Dominion, $665.00 from Bounty, and $3,492.00 from Branch. In 1979, he earned $7,767.00 from Bounty and $2,745.60 from Scottsdale. In 1980, Miner earned $2,500.33 from Bounty and $13,213.53 from Fray. In 1981, he earned $902.50 from Fray. Id.

A March 14, 1994 Notice of Claim was provided by DOL to Bounty, along with a copy of the claim and a Form CM-970(a), Operator Response Form. On April 6, 1994, Bounty controverted the claim, based on its need to examine evidence to confirm liability or coverage. On April 15, 1994, Bounty's carrier filed its response and controversion, reasserting Bounty's reasons for controversion as well as its affirmative defenses. (DX-20; DX-21; DX-22).[8]

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[7] JRC is not a party to the instant claim.

[8] The medical evidence, which has changed very little after the previous Decision and Order, was summarized in the previous Decision and Order and is again summarized below, including the addition of a death certificate, autopsy report, several pathological reports, and additional X-ray interpretations which were submitted after the Decision and Order.

Consequently, this portion of the discussion focuses primarily on the responsible operator evidence and evidence of survivorship submitted by the parties. The responsible operator issue was not considered in the previous Decision and Order,

On May 26, 1994, a claims examiner prepared a "Responsible Operator Rationale report" identifying Bounty as the responsible operator who provided a year or more of coal mining employment. The responsible carrier was identified as Old Republic Insurance Company, Inc. (Bounty's Carrier), which would be responsible for coverage from February 1978 through January 1984. The determination of coverage was based on: (1) Miner's Employment History Form CM-911a and Social Security Administration records that indicated he worked for Bounty from 1978 through 1980; (2) his last date of coal mining employment, which was identified as "1980," and (3) his total employment period or periods of "at least 365 days." (DX-7).

On August 4, 1994, a Notice of Initial Finding issued in favor of Miner, who was found to be totally disabled as of February 1, 1994. Ms. Thacker and Claimant were identified as dependents for augmentation. Bounty was identified as the responsible operator. Bounty and its carrier were considered liable for the payment of Miner's benefits. (DX-25).

On November 2, 1994, the District Director notified Bounty that Miner was entitled to benefits. Bounty could comply with the finding and pay benefits, or else the Trust Fund would pay benefits, for which Bounty may owe penalties and interest if found liable. Miner's two dependents, namely his spouse and Claimant, were identified in the notice, which indicated his monthly payment was calculated to be $748.00, beginning on November 1, 1994. A lump sum payment for the period from February 1, 1994 through October 31, 1994 of $6,732.00 was included. (DX-35).

On December 1, 1994, after Bounty and its carrier controverted the Initial Finding and submitted additional medical evidence in support of their contentions, interim benefits payments were begun by the Black Lung Trust Fund (the Fund) at the rate of $748.00 per month. (DX-36).

On December 20, 1994, the matter was referred by the District Director to OALJ for a formal hearing. (DX-37). In response to an April 19, 1995 Order to Show Cause regarding the propriety of three

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which only considered Miner's living miner's claim, because it was determined Miner failed to establish entitlement to benefits. (DX-121). For the purposes of this portion of the discussion, it is noted that the putative responsible operators and carriers identified by DOL timely controverted DOL's findings and submitted a litany of medical reports and X-ray interpretations in support of their contentions during the evolution of the matter.

issues, namely: (1) total disability, (2) responsible operator, and (3) last coal mine employment, Bounty argued other operators should be designated responsible operators, and counsel for the Director, OWCP sought a remand to name the potentially responsible operators, including Fray and Employer. With no objection to the District Director's Motion for Remand, the matter was remanded on July 7, 1995. (DX-46; See also DX-37, item numbers 7, 12, and 12(a); DX-48; DX-49, p. 2; DX-50, pp. 1-2; DX-51).

On June 6, 1995, Fray and its insurer were notified by DOL that they were putative responsible operators and instructed to provide wage and payroll information. (DX-47; DX-48). Fray responded with records for the period from March 31, 1980 through December 22, 1980. The records generally consist of hand-written or typed entries for daily logs of hours worked by various employees. The wage records indicate Miner physically worked 155 days during the 266-day period. (DX-65).

On October 27, 1995, Bounty's carrier, which allegedly provided coverage for all of the putative operators during the relevant periods of time, was notified that Fray would be identified as the last named operator, followed by Bounty, and lastly Employer.[9] (DX-59; DX-60; DX-61).

On November 27, 1995, Bounty submitted its employment records from August 1978 through February 1980. (DX-64). The records indicate Miner worked during the weeks ending December 8, 15 and 22, 1978.[10] (DX-64, pp. 9-11). He worked the entire months of January, February, and March 1979.[11] (DX-64, pp. 13-26). He worked

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[9] It was later determined Bounty's carrier did not provide coverage for Employer, which was a contract mine for Jewell Resources. (DX-86).

[10] As noted above, Miner's SSA records indicate he earned $665.00 at Bounty during 1978. Bounty's Cancelled checks for December 1978 indicate Miner was paid $224.86, $164.49, $125.00 on December 13, 20, and 22, 1978, respectively. The cancelled checks do not indicate gross earnings nor any withholding amounts. (DX-64, p. 76).

[11] Bounty's cancelled checks for January, February and March 1979 indicate Miner earned $680.31, $1,257.46, and $984.80, respectively. There is no indication on the checks whether the amounts are gross pay or net pay after deductions and withholding. (DX-64, pp. 77-80).

during the weeks of April 7, 20 and 27, 1979.[12] (DX-64, pp. 27, 29-30). He worked during the weeks of May 18 and 25, 1979.[13] (DX-64, pp. 33-34). He worked during the entire month of June 1979.[14] (DX-64, pp. 35-41). He worked during the week of July 13, 1979, when Bounty's records indicate he quit.[15] (DX-64, p. 43). Miner worked three days during the week of November 16, 1979.[16] (DX-64, p. 62). He worked during the weeks of February 9 and 16, 1980.[17] (DX-64, pp. 74-75).

On December 7, 1995, DOL notified Bounty's carrier that Fray and Bounty would be dismissed as potential responsible operators because Miner had less than one year of employment with each of those employers. It appeared to DOL that Miner worked for Fray for nine months while he worked for Bounty for eight months. (DX-67).

On April 11, 1996, Employer was identified as the responsible operator. (DX-74). A June 18, 1996 Initial Finding in favor of Miner and against Employer/Jewell issued in which Miner was found entitled to $748.00 per month after he became totally disabled on February 1, 1994. (DX-80).

On February 3, 1998, the parties attended a formal hearing before ALJ Miller. (DX-115). On May 12, 1998, Director, OWCP submitted its post-hearing statement in which it briefed only the responsible operator issue. (DX-117). On June 22, 1998, Employer submitted its post-hearing brief in which it argued Miner's only dependent was his son, Claimant. Miner's ex-wife was not a dependent according to Employer because she divorced Miner and

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[12] Miner received three checks from Bounty dated April 3, 10 and 26, 1979 for $260.58, $122.56 and $186.28, respectively. (DX-64, p. 81).

[13] Bounty's records include one cancelled check to Miner during May 1979 for $234.50. (DX-64, p. 82).

[14] Bounty submitted no cancelled checks for June 1979.

[15] Bounty's cancelled checks include payments to Miner on July 1 and 3, 1979 for $65.03 and $192.48, respectively. (DX-64, p. 82).

[16] Bounty's cancelled checks indicate Miner was paid $75.00 and $85.21 on November 16 and 19, 1979. (DX-64, p. 83).

[17] According to Bounty's cancelled checks, Miner was paid $176.03, $336.21 and $320.57 on February 13, 19 and 26, 1980, respectively. (DX-64, p. 84).

received no alimony or support. Employer argued three issues were germane to the matter: (1) responsible operator, (2) whether Miner suffered pneumoconiosis, and (3) causation. Employer denied it was the responsible operator. (DX-120, pp. 1-2).

On January 21, 1999, Miner died during the pendency of his claim before OALJ. (DX-123). On February 11, 1999, an autopsy report was prepared, indicating Miner suffered from coal worker's pneumoconiosis. (DX-123). The autopsy was not submitted to OALJ before the issuance of the Decision and Order Denying Benefits.

On March 25, 1999, a Decision and Order Denying Benefits issued in which one dependent, Claimant, was identified. Miner established at least eleven years of coal mine employment according to Social Security records. The issue of responsible operator was rendered moot because Miner was denied benefits. (DX-121, p. 3).

Because there was no autopsy, no evidence of complicated pneumoconiosis, the claim was filed after 1981, and Miner was living, Miner was not afforded any presumptions set forth in 20 C.F.R. §§ 718.304, 718.305, 718.306. (DX-121, pp. 3-4). Because the overwhelming majority of X-ray interpretations were negative by qualified readers, Miner had not established pneumoconiosis by a preponderance of the evidence. (DX-121, p. 8).

Miner was totally disabled based on his pulmonary function studies; however, based on the majority of non-qualifying arterial blood gas results, Miner failed to establish total disability. (DX-121, pp. 9-10). The only physician who diagnosed Miner with pneumoconiosis based on objective evidence was not as qualified as a litany of other experts who offered well-reasoned opinions Miner did not suffer from pneumoconiosis. Accordingly, Miner failed to establish pneumoconiosis and was denied benefits. (DX-121, p. 16).

On May 3, 1999, after the matter was appealed to the BRB, Miner's counsel filed a copy of an autopsy indicating the presence of pneumoconiosis with the BRB. (DX-123; 126). Miner's counsel sought a remand to the District Director for modification with copies of the new evidence. The BRB remanded the matter on May 12, 1999. (DX-124).

On October 6, 1999, DOL denied Miner's request for modification. (DX-127). Miner's counsel timely requested a formal hearing. (DX-128). The matter was referred to OALJ on February 4, 2000. (DX-136). On August 24, 2000, the matter was remanded for consolidation with Claimant's survivor claim. (DX-147; DX-148; DX-149; DX-150; DX-151; DX-152; DX-153). The two claims were consolidated on December 12, 2000. (DX-160).

On February 22, 2001, DOL issued an Order To Show Cause Why Modification Should Not Be Granted in favor of modifying Miner's claim to find Miner was totally disabled due to coal worker's pneumoconiosis, based on the medical report of Joshua A. Perper, M.D. The parties were directed to file objections within 30 days. (DX-161). On May 4, 2001, DOL issued a Proposed Decision and Order Granting Request for Modification, in which the October 6, 1999 denial of benefits would be modified to find entitlement beginning on February 1, 1994. Employer was identified as the responsible operator. (DX-169; DX-170). On May 24, 2001, Employer requested a hearing before OALJ. (DX-172).

B. Survivor's Claim

Claimant, born on July 9, 1985 to Miner and Ms. Thacker, filed his survivor's claim (2001-BLA-984) on August 29, 2000. (DX-9; DX-148). A Notice of Initial Finding in favor of Claimant and against Employer issued on February 22, 2001. (DX-161). On May 5, 2001, Employer was notified of an Initial Determination in Claimant's favor and that it should begin paying benefits within 30 days, or else the Trust Fund would pay benefits, for which Employer might owe penalties and interest if a Decision and Order issued in which it was found liable for the benefits. (DX-170). On May 14, 2001, Employer requested a formal hearing before OALJ. (DX-171).

On June 19, 2001, Claimant was notified the Trust Fund would begin paying benefits effective June 2001 at the rate of $500.50 per month as well as payment for the month since issuance of the Initial Determination in May 2001. (DX-173).

C. The Medical Evidence

Chest X-ray Evidence

Exhibit Number	X-ray Date	Doctor	Credentials	Interpretations
DX-43, p. 22	6/23/80	Brandon	–	No evidence of acute cardiopulmonary disease
DX-43, p. 24	12/1/80	Brandon	–	No evidence of acute cardiopulmonary disease
DX-43, p. 19	6/23/82	Brandon	–	No evidence of acute cardiopulmonary disease; stable appearance of the chest compared to earlier films.

DX-29, p. 3	7/19/82	Wiot	B, BCR[18]	Negative;[19] emphysema
DX-31, p. 4	7/19/82	Spitz	B, BCR	Negative; questionable opacity in clear space
DX-32, p. 4	7/19/82	Shipley	B, BCR	Negative
DX-43, p. 21	11/27/84	Patel	BCR	Mild emphysema; no superimposed acute pathology; chest stable since 6/23/80
DX-43, p. 26	6/30/90	Patel	BCR	Emphysema; chronic changes; no acute pathology
DX-32, p. 5	12/5/91	Shipley	B, BCR	Negative
DX-31, p. 5	12/5/91	Spitz	B, BCR	Negative; questionable opacity in left lung
DX-29, p. 4	12/5/91	Wiot	B, BCR	Negative; emphysema
DX-18	3/2/94	Shahan	BCR	Negative; linear scars left lung
DX-17	3/2/94	Gaziano	B	Negative; emphysema
DX-28, p. 2	3/2/94	Scott	B, BCR	Negative; emphysema, linear scars
DX-28, p. 3	3/2/94	Wheeler	B, BCR	Negative; emphysema
DX-43, p. 17	3/23/94	Patel	BCR	No acute pathology; COPD changes
DX-29, p. 5	3/28/94	Wiot	B, BCR	Negative; emphysema
DX-31, p. 6	3/28/94	Spitz	B, BCR	Negative; emphysema, linear strands in clear space
DX-32, p. 4	3/28/94	Shipley	B, BCR	Negative
DX-43, p. 18	3/28/94	Iyengar	–	No acute infiltrate, effusion, or masses; emphysematous changes

[18] "B" indicates a NIOSH-certified B-reader. "BCR" denotes a board-certified radiologist.

[19] "Negative" indicates no parenchymal abnormalities consistent with pneumoconiosis were found.

DX-26, p. 2	8/18/94	Bassali	BCR, B	pneumoconiosis type 1/1, q/t; right pleural plaque; left calcified pleural plaque; moderate to severe emphysema
DX-27, pp. 2-3	8/18/94	Aycoth	B	pneumoconiosis type 1/1, p/p; scattered rounded opacities up to 1.5 mm; emphysema
DX-27, pp. 13-14	8/18/94	Cappiello	B, BCR	pneumoconiosis type 1/1, p/p; emphysema
DX-27, pp. 7-8	8/18/94	Pathak	B	pneumoconiosis type 1/1, p/p; bilateral COPD changes; no acute pulmonary pathology
DX-41	8/18/94	Fino	B	Negative
DX-42	8/18/94	Orr	B, BCR	Negative; emphysema
DX-44, pp. 2-3	8/18/94	DeMarino	B, BCR	Negative
DX-53, p. 2	8/18/94	Wheeler	B, BCR	Negative; moderate emphysema with decreased lung markings
DX-53, p. 3	8/18/94	Scott	B, BCR	Negative; decreased lung markings compatible with emphysema
DX-39, p. 21	9/21/94	Orr	B, BCR	Negative; emphysema
DX-39, p. 13	9/21/94	DeMarino	B, BCR	Negative
DX-39, p. 4	9/21/94	Fino	B	Negative; possible emphysema
DX-30, p. 6	9/21/94	Sargent	B	Negative; emphysema; cor pulmonale; severe obstructive lung disease
DX-45, p. 2	9/21/94	Templeton	B, BCR	Negative; emphysema
DX-43, p. 13	10/14/94	Iyengar	–	lungs clear; normal chest
DX-43, p. 6	1/29/95	Patel	BCR	Hyperinflation of lungs; no acute pathology

DX-52, p. 14	1/29/95	Barker	–	Lungs are clear; no evidence of active inflammatory disease
DX-52, pp. 15-16	2/10/95	Peterkin	–	No acute abnormality
DX-112, p. 65	10/5/95	Naik	–	No acute intrathoracic abnormality; no pleural effusions; no area of consolidation
DX-112, p. 66	10/12/95	Naik	–	Pulmonary nodule in left upper lobe with possible left-sided pleural effusion; possible bronchogenic carcinoma
DX-112, p. 67	10/14/95	Seim	BCR	4.1 x 1.8 cm area of density with calcification suggests scarring or granuloma; COPD with bullous cystic change; small bilateral pleural effusions mostly on the right
DX-167, p. 5	10/14/95	Scott	B, BCR	3 cm. mass with calcifications on left apex with linear fibrosis radiating to pleura, most likely due to healed tuberculosis; cancer possible, but unlikely due to calcification; no evidence of silicosis/CWP
DX-167, p. 4	10/14/95	Wheeler	B, BCR	Irregular 4 x 2 cm. mass with linear scars more likely than a lymphatic spread of tumor; probable tiny calcified granuloma due to healed TB; mass is not CWP because there are no small round nodules in lungs; ill-defined scattered infiltrates compatible with inflammatory disease or possible edema; emphysema;

DX-73, p. 12	12/12/95	Whisnant	BCR	Lesion in left upper lobe
DX-73, p. 13	12/12/95	Whisnant	BCR	Nodule in left upper lobe with irregular borders and no calcifications;
DX-73, p. 3	1/17/96	Byers	–	Left spra-hilar upper lobe, hazy nodule previously evaluated
DX-112, p. 56	1/29/96	Peterkin	–	Irregular round density left upper lobe, possibly malignant; otherwise, lungs clear; no pleural effusions; no mediastinal or hilar masses identified
DX-112, p. 49	2/28/96	Naik	–	Persistent left upper lobe nodular opacity; otherwise lungs clear. NO evidence of significant pleural effusion
DX-112, p. 50	3/1/96	Naik	–	No evidence of a pneumothorax; no definite acute intrathoracic abnormality; opacity in upper left lung again noted
DX-112, p. 40	5/6/96	Peterkin	–	Ill-defined linear densities in right upper lobe; possible pneumonia or atelectatic changes
DX-112, p. 33	5/24/96	Seim	BCR	Development of right pneumothorax with COPD, densities and infiltrates possibly on the basis of some perihilar pneumonia, possibly partly chronic; left lung otherwise clear
DX-112, p. 34	5/24/96	Seim	BCR	Mild subsegmental atelectasis in right middle lung
DX-112, p. 35	5/25/96	Seim	BCR	Persistent mild atelectasis in right middle lung

DX-112, p. 36	5/25/96	Seim	BCR	No recurrent pneumothorax; atelectasis in right middle lung; nodular density in left upper lung
DX-112, p. 37	5/28/96	Seim	BCR	No evidence of right pneumothorax; COPD; small amount of subcutaneous emphysema in right lateral chest wall
DX-112, p. 38	5/29/96	Seim	BCR	No evidence of recurrent right pneumothorax; linear thickening right middle lung field; small density previously noted in left upper lobe; left lung otherwise clear
DX-112, p. 39	5/30/96	Seim	BCR	Satisfactory re-expansion of right pneumothorax
DX-112, p. 27	6/1/96	Peterkin	–	No definite new pneumothorax identified; no change since 5/31/96; emphysema on right again noted; irregular density in left upper lobe, possibly malignant
DX-112, p. 26	6/7/96	Peterkin	–	No acute intrathoracic abnormality identified; no evidence of pneumothorax; lungs emphysematous; bilateral densities unchanged from 6/1/96
DX-112, p. 17	10/22/96	Peterkin	–	No acute intrathoracic abnormality; underlying COPD; lungs emphysematous with some pulmonary fibrotic scarring in right mid and left upper lung
DX-112, p. 4	11/4/96	Seim	BCR	No changes seen since 10/22/96; no acute cardiopulmonary process noted; COPD

DX-92, p. 6	11/27/96	Sargent	B	Negative; emphysema; nodule on left upper lobe, 2 x 3 cm., likely granuloma
DX-95, p. 2	11/27/96	Wheeler	B, BCR	Negative; 1.5 cm mass left upper lobe compatible with cancer and granulomatous disease; moderate COPD; few linear scars in right upper lobe
DX-95, p. 4	11/27/96	Scott	B, BCR	Negative; 1.5 cm mass left upper lobe compatible with cancer and granulomatous mass; hyperinflation with scattered linear fibrosis; changes compatible with emphysema
DX-96	11/27/96	Cole	B, BCR	Negative; possible lesion left upper lobe
DX-167, p. 6	12/22/96	Wheeler	B, BCR	Negative; 2 cm mass in left upper lobe compatible with inflammatory disease or possible tumor with adjacent linear scars; minimal linear fibrosis; moderate emphysema
DX-111, p. 36	12/22/96	Naik	–	Small vague opacity left upper lobe, present since 1996
DX-167, p. 7	12/22/96	Scott	B, BCR	Negative; emphysema; few scattered linear scars; 2.5 cm mass in left upper lobe probably granuloma, possibly cancer
DX-111, p. 26	½/97	Peterkin	–	No definite intrathoracic abnormality; underlying COPD

DX-111, p. 17	4/21/97	Peterkin	–	Evidence of COPD; likely slight fibrotic change in right upper lobe; no pleural effusions or pneumothorax; no definite acute intrathoracic abnormality
DX-111, p. 9	5/2/97	Peterkin	–	No acute intrathoracic abnormality; evidence of COPD; no pleural effusions; no pneumothorax; no evidence of acute pulmonary infiltrate or edema
DX-111, p. 8	5/15/97	Peterkin	–	Hyperinflation compatible with COPD; no acutely developing pulmonary consolidation, edema, atelectasis; no pleural effusions or pneumothorax; no acute intrathoracic abnormality
DX-167, p. 8	12/10/97	Wheeler	B, BCR	Unreadable for ILO classification; 1.5 cm mass or fibrosis left upper lobe; moderate emphysema
DX-167, p. 9	12/10/97	Scott	B, BCR	Unreadable for ILO classification
DX-167, p. 10	1/6/99	Wheeler	B, BCR	Negative; 3 x 1.5 cm mass or scar left upper lobe compatible with inflammatory disease or cancer; minimal linear fibrosis compatible with healed inflammatory disease; moderate emphysema; no evidence of silicosis or CWP
DX-167, p. 11	1/6/99	Scott	B, BCR	Negative; 2 cm mass left apex, probably a scar, has not increased in size for several years; scattered linear scars; emphysema

DX-167, p. 12	1/16/99	Wheeler	B, BCR	Unreadable for ILO classification; small mass upper left lobe compatible with cancer or inflammatory disease; emphysema
DX-167, p. 13	1/16/99	Scott	B, BCR	Unreadable for ILO classification
DX-167, p. 21	1/16/99	O'Donohue	–	Sharply defined density in left upper lobe is unchanged from 1997, not present in 1995; no evidence of consolidation or pleural effusion either side; increasing streaky perihilar density, possibly atelectasis
DX-167, p. 22	1/18/99	O'Donohue	–	No change since 1/16/99 and 1/6/99; no evidence of acute disease or pleural effusion

Pulmonary Function Studies

Exhibit No.	**Test Date**	**Physician**	**FEV1**	**FVC**	**MVV**	**Qualifying**
DX-10, pp. 2-5	3/2/94	Forehand	.70 .78*	1.90 2.52*	23[20] 25	Yes No
DX-30, p. 7	9/21/94	Sargent	.50 .70*	1.52 2.69*	18 –	Yes No
DX-112, p. 68	10/16/95	Iosif	.57	1.18	18	Yes
DX-92, p. 9	11/27/96	Sargent	.60 .75*	2.09 2.46*	21	Yes Yes

* Denotes post-bronchodilator scores

[20] Dr. Michos, a board-certified medical examiner who was board-certified in internal medicine and board-eligible in pulmonary diseases, invalidated the March 2, 1994 MVV results by his reports dated March 25, 1994 and April 10, 1994. (DX-12; DX-13).

Arterial Blood Gas Studies

Exhibit No.	Physician	Test Date	pCO_2	pO_2	Qualifying
DX-43, p. 23	Pimentel	12/1/80	33	78	No
DX-43, p. 25	Unknown	6/30/90	36.8	72.5	No
DX-11, p. 3	Forehand	3/2/94	35 37*	71 56*	No Yes
DX-30, p. 31	Sargent	9/21/94	42.5	70.4	No
DX-43, p. 7	Briggs	1/29/94	35.2	98.2	No
DX-43, p. 14	Modi	10/14/94	44.2	102.2	No
DX-43 p. 10	Modi	12/6/94	40.6	80.3	No
DX-52, p. 12	Thakkar	1/31/95	42.2	72.0	No
DX-112, p. 64	Unknown	10/5/95	40.2	76.2	No
DX-112 p. 48	Iosif	2/27/96	36.7	59.6	Yes
DX-112 p. 25	Iosif	6/7/96	39.2	59.4	Yes
DX-94, p. 2	Iosif	7/29/96	48.1	50.2	Yes
DX-112, p.16	Iosif	10/21/96	43.5	72.8	No
DX-112, p. 3	Iosif	11/11/96	47.5	95.3	No
DX-92, p. 12	Sargent	11/27/96	40	70	No
DX-111, p. 35	Iosif	12/23/96	37.9	68.6	No
DX-111, p. 25	Guanlao	1/1/97	37.3	66.0	No
DX-111, p. 7	Iosif	5/14/97	47.5	93.2	No
DX-167, p. 20	Iosif	1/17/99	45.3	86.2	no

* Denotes the test was conducted during exercise.

Autopsy Report

On February 5, 1999, Dr. Larry W. Joyce reported the results of his January 22, 1999 autopsy of Miner, who died on January 21, 1999 following his January 16, 1999 hospitalization for lethargy and an electrolyte imbalance and an acute onset of nausea and related symptoms. (DX-153).

Miner's medical history was "most significant for end-stage lung disease, steroid dependent, with a tendency to develop fluid retention/anascara as a result of long-term steroid therapy." He was recently discharged from a prolonged hospital stay for end-stage chronic respiratory failure and pulmonary emphysema. Miner suffered from osteoporosis and chest and back pain related to steroid therapy. He was a coal miner "until a few years ago and has been a heavy smoker of many years." (DX-153, p. 1).

Internal examination of Miner's thoracic cavity revealed scattered foci of black pigment deposition bilaterally, including on the chest plate. Emphysematous blebs and "a few" fibrous adhesions were present bilaterally. Lymph nodes were black in appearance and measured up to 2.5 cm. (DX-153, p. 3).

Internal examination of Miner's respiratory tract revealed multiple scattered foci of black pigment deposition and a few fibrous adhesions. Miner's lungs revealed diffuse emphysematous changes throughout with multiple foci of parenchymal black pigment deposition. No tumor was identified. Id.

Microscopic examination revealed diffuse scattered pigment deposition with macrophages. The pigment was black, "finely granular to slightly course in appearance," and somewhat concentrated in some areas. All of the lung sections exhibited marked emphysematous changes, scattered foci of chronic inflammation, vascular congestion, foci of interstitial fibrosis/scarring, diffuse parenchymal black pigment depositions within macrophages. In many areas, the black pigment was embedded within fibrous tissue. Scattered foci of black pigment deposition were observed within the visceral pleura with foci of pleural fibrosis. No evidence of malignancy was reported. (DX-153, p. 4).

According to the prosector, the autopsy demonstrated coal workers' pneumoconiosis, marked emphysematous changes and acute pneumonia, primarily involving the left lower lobe. Death was attributed to respiratory system decompensation. The final diagnoses included: (1) coal workers' pneumoconiosis, coal macules, microcondular lesions, (2) diffuse emphysematous changes, marked,

with blebs of upper lobe apices, (3) acute pneumonia, and (4) no evidence of malignancy. (DX-153, p. 5).

Death Certificate

On January 27, 1999, Dr. Iosif reported Miner's last occupation was working as a coal miner. His immediate cause of death was respiratory failure due to emphysema and pneumonia. CWP was not reported. (DX-152).

Medical Reports

Dr. J. Randolph Forehand, M.D.

On March 2, 1994, Dr. Forehand, whose credentials are not of record, reported a Form CM-988, Medical History and Examination Coal Mine Workers' Pneumoconiosis. His cardiopulmonary diagnosis included Coal Workers' Pneumoconiosis and COPD. The etiology of the diseases included coal dust exposure (28 years) and cigarette smoking (20 years). Dr. Forehand concluded Miner was totally and permanently impaired and was unable to return to his last coal mine job. Miner was currently smoking cigarettes (½ to one pack per day). (DX-15).

On August 5, 1994, Dr. Forehand drafted a letter to DOL in which he affirmed his earlier conclusions that Miner suffered from diseases related to coal mine employment; however, he noted he was mistaken in his earlier reports regarding Miner's length of coal mine exposure. Although he earlier reported 28 to 30 years of coal mine exposure, but Miner actually worked around coal mines for more like 11 years, which was "a sufficient amount of time to develop symptoms as a result of coal mine employment." Notably, Dr. Forehand reported Miner's chest X-ray "did not show typical changes of pneumoconiosis;" however, Miner exhibited symptoms of emphysema, "also described in both smoking and non-smoking coal miners. Additionally, the effect of coal dust exposure and cigarette smoking is additive." (internal citations omitted). (DX-16).

Dr. J. Dale Sargent, M.D.

On September 23, 1994, Dr. Sargent, who is board-certified in internal medicine and the subspecialty of pulmonary diseases, reported the results of his history and physical examination of Miner. An electrocardiogram revealed results consistent with obstructive lung disease. Likewise, a chest X-ray revealed evidence of emphysema, cor pulmonale and hyperinflation consistent with obstructive lung disease, but was negative for pneumoconiosis. Dr. Sargent questioned whether Miner actually quit smoking, based

on the results of Miner's arterial blood gas study. Pulmonary testing indicated severe obstruction improved partially after the administration of a bronchodilator. Hyperinflation, air trapping and diminished diffusion consistent with severe pulmonary emphysema were noted. (DX-30, p. 2).

Dr. Sargent opined Miner, who experienced increased risks of respiratory disease from cigarette smoking and coal mine employment, suffered from a disabling respiratory impairment. According to Dr. Sargent, an impairment from cigarette smoking is distinguishable from an impairment related to CWP, based on objective criteria. CWP causes an impairment which may be identified by a positive X-ray and which causes a mixed obstructive and restrictive pattern that is not responsive to the administration of bronchodilators. On the other hand, lung ailments related to cigarette smoking cause a "purely obstructive impairment which may improve with exposure to bronchodilators and can be associated with an X-ray devoid of changes consistent with pneumoconiosis." Id.

Dr. Sargent noted Miner's "entire clinical picture is consistent with obstructive airways disease due to cigarette smoking." There was no evidence, namely a positive X-ray or a restrictive impairment which was unaffected by the use of a bronchodilator, to support a respiratory impairment due to coal dust exposure. Consequently, Dr. Sargent opined Miner suffered from long-term cigarette smoking rather than coal dust exposure. (DX-30, p. 3).

On June 14, 1995, Dr. Sargent prepared another report. (DX-54). He reviewed: (1) interpretations by the various physicians identified above of 14 chest X-rays taken between June 23, 1980 and January 29, 1995; (2) reports of pulmonary function studies and validation results regarding studies performed on September 21, 1994 and March 2, 1994; (3) 8 reports of arterial blood gas studies performed between December 1, 1980 and January 29, 1995; (4) reports of physical examinations performed on September 21, 1994 and March 2, 1994; (5) Miner's April 26, 1995 deposition transcript; (6) Miner's History and Physical Report and Discharge Summary between January 29 and 31, 1995; (7) Miner's March 29, 1994, October 15, 1994, and December 9, 1994 Discharge Summaries by Dr. Modi; and (8) Miner's August 5, 1994 Supplemental Report by Dr. Forehand. (DX-54, pp. 2-4).

Dr. Sargent concluded Miner did not suffer from CWP. Dr. Sargent found no evidence from Miner's chest X-rays of pneumoconiosis, which he noted was consistent with the opinions of "the vast majority" of the other physicians who interpreted Miner's

X-rays. He noted Drs. Pathak, Cappiello, Aycoth and Bassali found evidence of early simple CWP; however, he found the other physicians' opinions to the contrary more persuasive. He noted Dr. Wiot was "a renowned national expert" on interpreting films for pneumoconiosis and helped develop the B-reader certifying exam. (DX-54, pp. 4-5).

He explained that the character of Miner's impairment was "totally inconsistent" with exposure due to CWP, which causes positive X-ray evidence that was "clearly" not present on Miner's films. He noted Miner suffered from a "partially reversible purely obstructive ventilatory impairment with marked increase in lung volumes;" however, CWP causes an irreversible impairment that has elements of restriction, which was "absolutely excluded in [Miner's] elevated lung volumes." Consequently, although Miner had a mining history that might place him at risk for CWP, Dr. Sargent found "very little objective evidence" to suggest CWP was present. The only evidence in favor of finding CWP was noted by physicians whose findings were refuted by other experts. Accordingly, he concluded Miner did not suffer from CWP. (DX-54, p. 5).

Dr. Sargent opined Miner suffered from a disabling, partially reversible ventilatory impairment that was very severe. The impairment was the result of long-term cigarette smoking. Id.

Dr. Sargent opined Miner's respiratory impairment was not due in whole or in part from coal mine employment or coal dust exposure. He explained coal dust exposure causes "characteristic abnormalities of chest X-rays and pulmonary functions, neither of which Miner demonstrated. Rather, he opined Miner suffered from "exactly the type of impairment that cigarette smoking causes." Miner was "absolutely not" of the physical capacity to return to coal mine work. (DX-54, pp. 5-6).

On December 3, 1996, Dr. Sargent reported the results of his November 27, 1996 physical examination of Miner. An electrocardiogram revealed sinus tachycardia, while a pulmonary function study indicated severe obstructive ventilatory impairment which improved with a bronchodilator. Arterial blood-gas results were within normal limits. A chest X-ray revealed obstructive lung disease without evidence of pneumoconiosis. Dr. Sargent opined a nodule observed in Miner's left upper lobe was likely either granulomatous change or possible neoplasm. He opined the nodule did not likely represent a change of complicated pneumoconiosis. (DX-92, p. 2)

Dr. Sargent concluded Claimant was not suffering from CWP, based on negative chest X-rays and abnormal ventilatory studies

that were inconsistent with CWP. Dr. Sargent opined Miner's inability to perform lung volumes and his diminished diffusing capacity were consistent with centrilobular pulmonary emphysema caused by cigarette smoking. Such a disease is known to cause X-ray changes observed in Miner's films and measurable pulmonary function abnormalities. Focal emphysema associated with CWP is a pathologic finding that is not associated with chest X-ray changes or measurable pulmonary function abnormalities. (DX-92, p. 3).

Dr. Sargent noted the nodule observed in Miner's left upper lobe could be interpreted by some physicians as complicated pneumoconiosis; however, the "background changes of simple [CWP] which are usually associated with complicated [CWP] are not present." Consequently, Dr. Sargent opined the nodule was more likely represented as a granulomatous or neoplastic process. He noted Miner's transbronchial biopsy previously performed by Dr. Byers failed to show either a tumor or pneumoconiosis and that "the lesion appeared to be stable over the last ten months." Id.

Dr. Sargent concluded Claimant suffered a disabling respiratory impairment due to pulmonary emphysema secondary to long-term cigarette smoking. Miner's pulmonary nodule required follow-up treatment to assure it was benign. Id.

Dr. Gregory J. Fino, M.D.

On June 28, 1995, Operator/Carrier submitted to DOL and Miner copies of a June 20, 1995 report by Dr. Fino, who is board-certified in internal medicine and the subspecialty of pulmonary diseases. (DX-54). Dr. Fino reviewed: (1) Miner's work history and background information, (2) medical records and X-ray interpretations from June 23, 1980 through January 31, 1995, and (3) Miner's April 26, 1995 deposition transcript. (DX-54, pp. 7-19).

Dr. Fino concluded Miner did not suffer from an occupationally-acquired pulmonary condition arising out of coal mine dust exposure. He found the majority of chest X-ray readings were negative for pneumoconiosis. The two chest films he performed and interpreted on Miner revealed no evidence of any occupational pneumoconiosis. He opined Miner suffered from a "pure obstructive ventilatory abnormality," which occurred "in the absence of any restrictive defect." Miner's obstruction involved the "small" airways to a greater proportional degree than the "large" airways, which is inconsistent with a coal dust related condition; however, the results are consistent with cigarette smoking, pulmonary emphysema, non-occupational bronchitis, and asthma. Miner's

pattern was consistent with an abnormality seen with asthma or cigarette smoking. (DX-54, p. 20).

Dr. Fino noted Miner's condition improved with bronchodilators, implying the cause of his condition is "not fixed and permanent." Pneumoconiosis is "fixed," which means the condition would not be ameliorated by the use of bronchodilators. According to Dr. Fino, "One cannot improve on an abnormality caused by [CWP.]" Because Miner's condition improved with the use of bronchodilators, his condition indicated reversibility, which was "clearly evidence of a non-occupationally acquired pulmonary condition causing the obstruction." Id.

Dr. Fino noted the difference between elevated lung volumes, which are due to obstructive lung disease, and diminished lung volumes, which are due to contraction from fibrotic scarring, as seen in pulmonary fibrosis. He found Miner's lung volumes were elevated because stale air was trapped in the lungs due to his obstructive lung disease, a typical pattern of emphysema, asthma, or chronic obstructive bronchitis, or any combination of the three. He concluded Miner's condition was inconsistent with the contraction of lung tissue due to fibrosis, as would be expected in simple CWP. He attributed Miner's decrease in pO2 to his "significant pulmonary emphysema," but found no evidence of a coal mine dust-related condition. (DX-54, pp. 20-21).

Dr. Fino concluded there was insufficient evidence to conclude Miner suffered from CWP. He opined Miner did not suffer from an occupationally acquired pulmonary condition; however, Miner suffered from a disabling respiratory impairment due to cigarette smoking. He opined Miner's condition would be the same "had he never stepped foot in the coal mines." (DX-54, p. 21).

Dr. Joseph J. Renn, III, M.D.

On September 28, 1995, Operator/Carrier submitted to DOL copies of Miner's June 27, 1995 report by Dr. Joseph J. Renn, III (B-reader from February 1, 1995 through January 31, 1999), who was Board-certified in Internal Medicine with a sub-specialty diploma in Pulmonary Disease. (DX-55, pp. 1-6, 17).

Dr. Renn reviewed: (1) DOL's description of coal mine work and other employment dated January 31, 1994; (2) Miner's medical reports of Drs. Forehand and Sargent dated March 2, 1994 and September 21, 1994, respectively; (3) Buchanan General Hospital records of hospitalization for periods during 1994 and 1995; (4) an August 5, 1994 report by Dr. Forehand; (5) Miner's April 26, 1995 deposition transcript; (6) pulmonary function studies dated March

2, 1994 and September 21, 1994; (7) arterial blood gas studies from December 1, 1980 through January 29, 1995; (8) electrocardiographs; and (9) Miner's chest X-rays from June 23, 1980 through January 29, 1995. (DX-55, p. 2).

Dr. Renn concluded Miner was a 62-year old individual with severe pulmonary emphysema. Miner did not have pneumoconiosis, but suffered from a "very severe, significantly broncho-reversible obstructive ventilatory defect of a sufficient degree to prevent him from being able to perform any but sedentary activities." His emphysema was the result of tobacco use rather than exposure to coal mine dust, which was neither a cause of, nor a contributor to, his impairment. Dr. Renn noted no radiographic evidence of pneumoconiosis. However, he found evidence of emphysema symptomatically, physically, physiologically, and radiographically. Miner's wheezing, which occurred in bronchospastic airways, does not occur in pneumoconiosis. Miner's chest hyperexpansion occurs with emphysema, but not with CWP. Rhonchi and wheezes in Miner's bronchospastic airways do not occur with CWP. The abnormalities Miner exhibited occur in pulmonary emphysema associated with tobacco smoking, but not in CWP. He added, "the focal emphysema associated with [CWP] does not become radiographically apparent, but the emphysema associated with tobacco smoking does so after reaching a certain severity." (DX-55, p. 6).

Dr. M. J. Thakkar, M.D.

On October 12, 1995, Miner submitted to DOL a copy of a September 11, 1995 summary letter from Dr. Thakkar, a cardiologist and doctor of internal medicine. (DX-56). Dr. Thakkar explained he treated Miner for acute exacerbation of COPD and chest pain. He reported Miner worked in a coal mine for 28 years. Physical examination revealed emphysematous chest and diffused rhonchi throughout the chest. Dr. Thakkar noted Miner's chest X-ray "did not show any interstitial disease but clinically, [Miner] had significant [COPD] and my feeling is that he did have clinically [CWP] even though his X-ray failed to show it." He opined Miner's chronic lung disease was "related to the coal mines and smoking for 20 years." Miner's respiratory capacity was "so poor that he could not do any kind of activity without getting severely short of breath . . . in my opinion, he could not go back to work in coal mine [sic] or even do any kind of light work." According to Dr. Thakkar, Miner was disabled due to his chronic lung disease. (DX-56, p. 2).

Dr. German Iosif, M.D.

On January 30, 1997, Dr. German Iosif, M.D., who is board-certified in internal medicine and a subspecialty in pulmonary diseases, notified DOL that he had treated Miner since 1995 for COPD/CWP and increasing respiratory failure. He noted Miner's severe condition precluded him from performing any exercise to measure blood gases. He enclosed copies of Miner's July 1996 blood gas studies. (DX-94).

On August 5, 1997, Dr. Iosif prepared a letter to Miner's attorney, in which Dr. Iosif reported he had treated Miner since 1995 for an irreversible, disabling respiratory disease. Miner was at a terminal stage of the disease in 1995. Dr. Iosif was unaware who originally prescribed continuous oxygen for Miner, but agreed with the prescription. Dr. Iosif reported Miner had 28 years of coal mine employment through 1980. He also reported Miner quit smoking in 1994 after a twenty-year smoking history of between one-half and one pack of cigarettes per day. (DX-110, p. 1).

Dr. Iosif noted Miner's chest X-rays revealed a stable nodule in the left upper lobe, along with hyperinflation and the presence of scattered non-specific interstitial opacities. Dr. Iosif conceded he was not a B-reader and was unable to render an opinion regarding the presence or absence of CWP, "but it will probably not indicate a very high profusion score." Id.

Dr. Iosif reported that Miner was "legally and clinically diagnosed with [CWP]" before Dr. Iosif began treating Miner. He opined Dr. Forehand ostensibly offered the initial opinion at the request of DOL. Dr. Iosif was unaware of the basis for such a diagnosis, but noted:

> Given the advanced degree of impairment and disability already established, the diagnostic distinction among COPD, CWP, pulmonary emphysema or whatever combination of these entities made no difference from a medical standpoint in regards to the type of therapy to be administered.

He added that Miner's attorney should refer to Dr. Forehand's assessment regarding the basis for CWP diagnosis. Miner was presently irreversibly disabled from returning to work in coal mines or other occupations with similar physical demands. (DX-110, pp. 1-2).

Dr. Iosif's January 16, 1999 history and physical report of Miner indicated Miner was a coal miner and a heavy smoker with a

history of end-stage lung disease. (DX-167, pp. 15-16). Clinical impressions included: (1) electrolyte imbalance; (2) end-stage lung disease; and (3) urinary tract symptoms. (DX-167, p. 18). Dr. Iosif's January 21, 1999 discharge summary failed to discuss CWP. The final diagnoses indicated Miner suffered from an electrolyte imbalance, emphysema and end-stage lung disease with pneumonia. (DX-167, p. 14).

On July 16, 2003, Dr. Iosif prepared a letter indicating he treated Miner for several years until Miner's death. Dr. Iosif opined Miner died from progressive respiratory failure due to a combination of COPD and CWP, given Miner's previous employment as an underground coal miner. Autopsy revealed diffuse CWP associated with extensive emphysematous changes and acute pneumonic infiltration of both lungs. Consequently, Dr. Iosif opined CWP certainly contributed to the progressive deterioration of Miner's condition and to his eventual death. (CX-1).

Dr. John A. Michos, M.D.

On April 23, 1997, Dr. Michos, who is board-certified in internal medicine and the subspecialty of pulmonary diseases, notified DOL that Miner did not suffer from CWP based on a documented 11.3-year history of coal mine employment and the following medical documentation: Dr. Iosif's January 20, 1997 letter, Dr. Sargent's medical examinations and reports, Dr. Thakkar's September 11, 1995 letter, Dr. Renn's June 27, 1995 medical examination of Miner, Dr. Fino's June 20, 1995 medical examination, and Dr. Forehand's examinations on August 5, 1994 and March 2, 1994. Dr. Michos noted the predominance of Miner's radiographs were negative for CWP as interpreted by numerous qualified B-readers. He concluded Miner's condition was typically seen in patients with cigarette abuse rather than in patients with simple CWP. Consequently, Dr. Michos opined Miner suffered from a disability due to cigarette smoking rather than from prior coal mine employment. (DX-14; DX-99).

Dr. James R. Castle, M.D.

On January 14, 1998, Counsel for Meadows submitted a January 12, 1998 medical report by Dr. James R. Castle, M.D. (B-reader from July 1, 1993 until June 30, 1997), who is board-certified in internal medicine and the subspecialty of pulmonary diseases. (DX-114, p. 23).

Dr. Castle reviewed Miner's medical records, radiographic interpretations, and medical reports of evaluations and examinations. He concluded Miner did not suffer from CWP. He

noted Miner worked eleven years in coal mine employment rather than 28 years. He assumed Miner had an adequate exposure history to cause development of CWP, if he were a susceptible host. (DX-114, p. 17).

Dr. Castle observed Miner reported a 20-year history of cigarette smoking, which is a sufficient time to develop COPD, emphysema, or lung cancer. No physical findings in Miner's records indicated the presence of interstitial pulmonary processes which would be expected with clinically significant CWP; however, Miner consistently exhibited evidence of smoking-related conditions. He noted the "vast majority" of B-readers found no evidence of CWP, but found evidence of smoking-related disorders. Id.

Physical findings indicated a severe partially reversible obstructive ventilatory defect. Miner's diffusing capacity was reduced on some occasions with no objective evidence of any restriction, which is inconsistent with CWP. Such findings were "absolutely typical" of smoking-related disorders. CWP involves irreversible obstructive and restrictive ventilatory processes and reveal positive X-ray findings. No such evidence was present in Miner's records. Arterial blood gas studies were normal at rest, but pO2 levels dropped with exercise, which was consistent with Miner's emphysema. (DX-114, pp. 17-18).

Consequently, Dr. Castle concluded Miner's condition was entirely the result of cigarette smoking. His condition was not caused in whole or in part by coal mine employment or coal dust exposure. Even if it was assumed Miner's chest X-rays were positive for CWP, he would still not be disabled by that process because there were no physical findings indicating CWP. Thus, Miner's condition was purely the result of cigarette smoking. (DX-114, pp. 18-19).

On April 5, 2002, Dr. Castle reported his conclusions based on additional medical records, including the pathology reports and records of Drs. Tomashefski and Perper. He concluded Miner's 11-year coal mine employment was sufficient for Miner to develop CWP if he were a susceptible host. He also reported Miner's smoking history of 20 years or more which was sufficient to develop COPD, namely chronic bronchitis, emphysema and/or lung cancer. (EX-4, p. 13).

Dr. Castle noted that Dr. Joyce did not describe any findings of complicated CWP or pulmonary massive fibrosis in the autopsy report. He added that Dr. Perper conceded the lesions in Miner's pathological evidence did not meet necessary criteria to establish complicated CWP. Dr. Castle otherwise concurred with the opinions

of Dr. Tomashefski. He also noted that, "while [CWP] may cause airway obstruction and obstructive lung disease, it does so in the presence of a significant radiographic abnormality." Dr. Castle agreed with Dr. Tomashefski that the medical literature indicates that "the typical degree of obstructive airway changes is minimal in patients with [CWP]." He noted that Miner developed evidence of an irregular, spiculated left upper density between January 21, 1995 and October 5, 1995, which is insufficient time for a large abnormality to develop and establish complicated CWP. (EX-4, pp. 13-14).

Dr. Castle opined Miner's pathologic evidence indicated the presence of simple CWP, but did not reveal complicated CWP or progressive massive fibrosis." Miner's death was the result of end-stage tobacco smoke-induced pulmonary emphysema with recurrent episodes of respiratory failure. Miner's death would have occurred "as and when it did regardless of his occupational exposure and regardless of the presence of occupational pneumoconiosis. Pneumonia is a bacterial infection that occurs with greater frequency in individuals that have pulmonary emphysema." (EX-4, p. 15).

Dr. Roger J. McSharry, M.D.

On April 24, 1998, Dr. McSharry, who is board-certified in internal medicine and the subspecialty of pulmonary diseases, reviewed medical evidence, including Dr. Sargent's December 3, 1996 report and supporting diagnostic studies, and supplemental information submitted by Operator/Carrier, including 12 inpatient hospitalization reports, 33 outpatient office visits at Dr. Iosif's office, three chest X-ray reports and Dr. Iosif's August 5, 1997 report to Miner's attorney. (DX-118; p. 11).

Dr. McSharry concurred with the opinion of Dr. Sargent that Miner was not suffering from CWP. Although there was positive evidence of severe respiratory disease, the malady appeared to be the result emphysema related to smoking cigarettes. Dr. McSharry noted Miner's October 13, 1995 CT scan indicated severe bulluous lung disease, particularly in the right lower lobe. Miner's left upper lobe mass was mentioned numerous times on multiple reports, but without any evidence of any increase in size. With a lack of other radiographic abnormalities suggesting CWP, Dr. McSharry affirmed Dr. Sargent's opinion that Miner's nodule was not a conglomerate lesion of pneumoconiosis. The remainder of findings revealed on Miner's CT scan was compatible with cigarette-induced lung disease. (DX-118, pp. 11-12).

Dr. McSharry noted a spontaneous right-sided pneumothorax was treated in May 1996, and no subsequent evidence of pneumothorax was available. Such pneumothorax, which is a frequent complication of severe bulluous emphysema, was not surprising in Miner's condition and did not raise additional concerns about CWP. According to Dr. McSharry, there were no new chest radiographs which indicated the presence of CWP since Dr. Sargent last examined Miner; however, Miner treated several times subsequent to Dr. Sargent's examination for respiratory complaints consistent with severe obstructive pulmonary disease. Notably, Miner was prescribed a mechanical ventilation device which is "the type frequently seen in patients with severe obstructive pulmonary disease." It is also commonly needed by patients with severe tobacco-induced lung disease. Dr. McSharry concluded, "nothing about any of [Miner's] hospitalizations suggests [CWP]." (DX-118, p. 12-13).

Dr. McSharry noted Dr. Iosif's initial assessment of Miner was based on a twenty-year history of cigarette smoking, which was undermined by hospitalization reports indicating Miner smoked more than one pack of cigarettes per day for nearly thirty years. He affirmed Dr. Iosif's conclusion that Miner was irreversibly disabled by end-stage lung disease from returning to coal mine employment or similar occupations, based on objective evidence. (DX-118, p. 113).

Dr. McSharry disputed Dr. Iosif's opinion that the diagnostic distinction between obstructive pulmonary disease and CWP makes no difference from a medical standpoint regarding therapy. According to Dr. McSharry, oral corticosteroid therapy and bronchodilators are "standard therapies for obstructive pulmonary disease, but have no role in [CWP]," which is "not at all affected" by the treatments. Miner's repeated positive responses to the treatments supported a conclusion that CWP did not cause Miner's condition. Id.

Dr. McSharry found "no evidence whatsoever" that Miner suffered from CWP. Rather, the medical evidence suggested Miner suffered from severe COPD most likely related to smoking cigarettes. Consequently, he concluded there was no evidence CWP or coal mine employment had "any bearing" on Miner's disease. Id.

On February 22, 2002, Dr. McSharry reported his conclusions based on additional medical records. Miner suffered from simple CWP, although the B-readings were overwhelmingly negative. Autopsy evidence revealed "low profusion [CWP] as well as the presence of two larger fibrotic lesions, [which] were found in both the right and left lung." Dr. McSharry, who conceded he is not a pathologist, noted the difference in pathological opinions

regarding the cause of the lesions. Dr. McSharry opined that it is "unlikely that they represent progressive massive fibrotic lesions," which are generally found in relation to high profusion [CWP] and represents the coalescence and fibrosis of numerous individual lesions of pneumoconiosis." Because of the low profusion, which was low enough to preclude positive findings on the radiographs interpreted by multiple B-readers, the development of progressive massive fibrosis was "extremely unlikely." Dr. McSharry opined that Miner's history of hospitalizations for severe exacerbation of COPD, which was successfully treated with antibiotics and steroid therapy supports the conclusion that the lesions represent scarring related to previous inflammatory disease. (EX-3, pp. 1-2).

Dr. McSharry concluded Miner did not suffer from progressive massive fibrosis and that the scarring and fibrosis demonstrated at autopsy was not related to his coal mine employment or dust exposure. Miner's simple CWP did not contribute to his disability. Rather, the "vast majority of the abnormalities demonstrated by physiologic studies, chest radiographs, and in fact at autopsy, suggest emphysema which is related to smoking and not substantially contributed to by his coal mine employment or dust exposure." Miner's CWP of such low profusion did not hasten Miner's death. Dr. McSharry concluded Miners' overwhelming abnormality was smoking-induced emphysema, an "all too common respiratory disorder that prematurely ends the life of hundreds of thousands of smokers, with or without coal exposure, each year." (EX-3, p. 2).

Dr. Peter G. Tuteur, M.D.

On September 24, 2001, Dr. Tuteur, who is board-certified in internal medicine and the subspecialty of pulmonary diseases, reported his conclusions based on a review of Miner's medical records, autopsy evidence and medical literature. He opined Miner's pathological evidence revealed CWP, which was characterized as low profusion and simple in character. Although the CWP was present at autopsy, it was of such low profusion that it did not contribute to clinical symptomatology, physical examination findings, physiologic impairment, or abnormal radiographs. Miner's most significant problem was COPD manifested by advanced centrilobular emphysema complicated by recurrent exacerbations due to pulmonary infections that led to his death. The condition was unrelated to and not aggravated by the inhalation of coal mine dust or the development of CWP. (EX-2, pp. 5-6).

Dr. Tuteur noted Miner exhibited extreme breathlessness associated with wheezing, a manifestation of airflow obstruction and recurrent chest pain almost certainly due to air-trapping in

association with wheezing. Clearly, the "quintessential clinical feature of [CWP] is breathlessness," but "cough, expectoration, wheezing, and chest pain are not regular features of [CWP]. The changes seen in Miner's physical findings during treatment were consistent with smoking-induced COPD. When CWP is significantly advanced to produce abnormal physical examination, "one expects to find decreased lung expansion and/or persistent late inspiratory crackling sounds. It is the persistence of findings once developed that reflects the irreversibility of [CWP]." He noted Miner's CT scan of the thorax confirmed the absence of changes compatible with CWP and presence of an irregular unilateral soft tissue mostly within the lung parenchyma. (EX-2, p. 6).

Dr. Tuteur noted that all pathologists agree Miner demonstrated simple CWP. Likewise, all pathologists commented on the severity of emphysema. Dr. Tuteur disagreed with the opinions of Dr. Perper, who was the only pathologist to find complicated pneumoconiosis. Based on the totality of all available data and based on a careful review of the appropriate medical literature, Dr. Tuteur opined Miner suffered simple CWP of low profusion and severity at the time of death. The condition did not hasten or cause his death. Rather, Miner's condition was the result of the manifestation of centrilobular emphysema. Miner's respiratory infections, for which Miner received treatment, "often leave behind areas of scars as a manifestation of healing." Such a scar manifested in the left upper lobe, which was interpreted on X-rays as a nodule and pathologically confirmed on autopsy as a post-inflammatory scar. It was not a nodule of progressive massive fibrosis (complicated CWP), which has inconsistent characteristics than those revealed in Miner's nodule. He added that complicated CWP "almost never occurs with low profusion pneumoconiotic changes within the lung parenchyma." (EX-2, p. 18).

Consequently, Dr. Tuteur opined Miner was "totally and permanently disabled to such an extent that he was unable to work in the coal mine industry, but this disability was a result of cigarette smoke-induced [COPD], not [CWP] or any other coal mine-dust-induced disease process." (EX-2, pp. 18-19). Dr. Tuteur explained that, "I fully recognize the possibility that the chronic inhalation of coal mine dust may produce a clinical picture exactly like that experienced by [Miner];" however, he noted that "persons with a smoking history reported for [Miner] have greater than a 15% chance of developing such a clinical picture. Never-smoking coal miners will develop this picture less than one percent of the time, probably quite a bit less than one percent." Accordingly, Dr. Tuteur concluded Miner's condition was not the manifestation of CWP. Likewise, Dr. Tuteur noted COPD may be the result of chronic inhalation of coal dust, but opined Miner's condition was related

to smoking because Miner's CWP involved less than three percent of his lung, which was of insufficient severity and profusion to produce symptoms or clinical findings. (EX-2, p. 19).

Dr. Tuteur again noted that manifestations of coal mine dust-induced pulmonary problems may develop following cessation of coal mine employment and dust exposure. Further, he noted the disease may progress following the last coal dust exposure; however, he concluded that "one must deal with the frequency of such an occurrence. Progression is most common when coal mine dust exposure is discontinued in miners who already have high level profusion and/or complicated CWP." Such progression tends to occur in the few months or early years following the cessation of coal mine dust exposure. When a miner has little or no manifestations at the time of last exposure, and no documented progression develops in the last few years following the cessation of exposure, subsequent clinical manifestations of physiologic impairment and radiographic change is highly unlikely." Id.

Dr. Joshua A. Perper, M.D.

On February 3, 2001, DOL submitted a copy of an Independent Medical Examiner's report prepared by Joshua A. Perper, M.D., who is a forensic pathologist, clinical professor of pathology at the University of Miami, and medical consultant. (DX-154).

Dr. Perper reviewed Miner's autopsy report and slides, death certificate, medical records and reports. He noted Miner had eleven years of mining employment and reported 20 years of smoking cigarettes, although it was questionable when Miner actually quit smoking. (DX-154, pp. 2-3).

Dr. Perper concluded Miner suffered from: (1) CWP, severe, complicated, with macules, nodules, fibro-anthracotic area containing coalescing nodules exceeding 2.0 cm; (2) centrilobular emphysema; (3) bronchopneumonia; (4) bronchitis; (5) congestion and edema of lungs; (6) hemorrhage; and (7) sclerosis of intra-pulmonary blood vessels consistent with pulmonary hypertension. (DX-154, p. 33).

Dr. Perper concluded Miner suffered from severe, complicated CWP based on "clear evidence," including: (1) verified exposure to coal mine dust for more than 11 years as an underground miner; (2) severe, chronic and acute exacerbations of respiratory impairment and disability with "subjective symptomatology and objective manifestations, numerous hospitalizations, and impaired diffusion of gases with severe hypoxemia;" (3) "unquestionable" pathological findings of severe CWP in Miner's lungs. (DX-154, p. 33).

Dr. Perper noted the majority of X-ray interpretations did not diagnose CWP "in spite of its clear presence at autopsy with nodules as large as 2.5 cm."[21] He reported that it is "well known" that radiologists miss a diagnosis of CWP, citing a 1996 study in which mild and complicated pneumoconiosis were incorrectly reported as negative. (DX-154, p. 34).

Dr. Perper reported Miner's lungs were indicative of complicated CWP "with areas of fibro-anthracosis exceeding 2.5 cm. and associated marked centrilobular emphysema, and the pathological findings "are the golden standard for establishing [CWP]." He noted the pathological findings included two such areas: (1) in the left-upper lobe (0.9 cm.), which was reported radiographically; and (2) in the right-upper lobe. It was "some puzzling . . . how the prosector missed those two obvious lesions clearly documented in the microphotographs." Id.

Dr. Perper disputed other physicians' opinions which previously found no evidence of pneumoconiosis. He argued the presence of obstructive respiratory disease and emphysema do not exclude the likelihood of pneumoconiosis, as the other physicians opined, because recent studies established that exposure to coal mine dust with silica results in centrilobular emphysema. Thus, it is equally likely that smoking or coal dust exposure causes emphysema. Further, positive pathological findings were "unquestionable." (DX-154, pp. 33-34).

Dr. Perper opined Miner suffered from complicated CWP. The definition of CWP is "the presence of pneumoconiotic fibro-anthracotic lesions of 2.0 cm. or greater." Radiological findings of a nodule exceeding 1 cm (up to 2.5 cm in size) in the left upper lobe with pathological findings was noted. Pathological, microscopic findings of an area of fibro-anthracosis up to 2.5 cm in the right upper lobe was also noted. Dr. Perper reported Miner did not suffer from cancer, TB or other granulmatous processes. Thus, the evidence "clearly" compelled a conclusion of complicated CWP. He conceded the "large pneumoconiotic lesions did not include some features seen in complicated [CWP], such as central

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[21] Dr. Perper reported two pneumoconiotic macronodules measuring 0.9 cm and 0.7 cm in Miner's upper left lobe, which also displayed micronodules measuring 1-2 mm. He also reported the presence of silica crystals. In Miner's right lung, Dr. Perper reported an irregular band of fibro-anthracosis measuring 2.5 cm x 1.0 cm. "Scar emphysema" was present around the area. Scattered macules and fibro-anthracotic and hyalino-silicotic micronodules measuring 2-3 mm were also reported. (DX-154, pp. 31-32).

liquefaction and necrosis;" however, he noted such features are "not essential" for the diagnosis of CWP. Rather, "the critical factor is a size of 2.0 cm. or larger pneumoconiotic lesion." He noted that 2.0 cm. size nodules necessary to diagnose complicated CWP was historically much more flexible. (DX-154, p. 35).

According to Dr. Perper, Miner's CWP caused, substantially contributed to, or accelerated Miner's death, based on pathological results and the presence of pneumoconiosis with his other respiratory ailments which substantially contributed to his death, regardless of the complicated degree of his pneumoconiosis. He opined, "the degree of pneumoconiosis in [Miner's] lungs, was of sufficient severity to constitute a substantial contributory cause of death." (DX-154, p. 35-36).

Dr. Perper opined exposure to coal mine dust and CWP results in emphysema, a "widely and virtually universally accepted" theory discussed in textbooks and journals. He concluded Miner's death was the result of his occupational exposure as a coal miner to coal dust, based on the years he worked in the coal mines and the pathological findings. (DX-154, p. 36).

Thus, Dr. Perper concluded: (1) Miner demonstrated evidence of significant CWP with silicotic features, "consistent in size with complicated coal workers' pneumoconiosis [CWP], with associated centrolobular emphysema;" (2) Miner developed CWP from his "long-standing occupational exposure to coal mine dust as a miner;" and (3) CWP was a substantial contributory cause of Miner's disability, "both directly and through hypoxemia and complicating bronchopneumonia." (DX-154, pp. 36-37).

Dr. Richard Naeye, M.D.

On May 24, 2001, Meadows submitted a medical report of Dr. Richard Naeye, a Board-certified pathologist who refuted Dr. Perper's opinion, and concluded Miner's pneumoconiosis played no role in his death nor contributed to his disability. (DX-172).

Dr. Naeye noted Miner retired from mining in 1980; however, Miner, who reported a smoking history of 0.5 to 1.0 pack of cigarettes per day for 20 to 30 years, continued to smoke through 1995. He observed that many chest X-rays between 1980 and 1994 were interpreted as negative for CWP or unreadable. He noted that negative reports do not exclude the presence of CWP, which, when mild, may not appear on X-rays. He noted Miner's death certificate did not identify CWP as a cause of death. (DX-172, p. 1).

Dr. Naeye reported Miner's autopsy revealed black pigment in his lungs' parenchyma. The most widespread and disabling abnormality was centrilobular emphysema, which was severe in half of the tissues available for review and moderately severe in the rest. The second most problematic abnormality was acute lobular pneumonia, which varied from mild to severe in one-third of the available pieces of lung tissue. The next most frequent abnormality was acute pulmonary edema. Id.

Dr. Naeye noted black pigment was present in only small quantities in the lungs at subpleural locations, adjacent to small arteries and airways, involving no more than one to two percent of the lung tissues. Crystals free of toxic silicates were visible, but surrounded by emphysema. Whether the emphysema was centrilobular or focal in origin could not be determined because the centrilobular emphysema was so severe that it would "usually be contiguous with any focal emphysema that might be present." A "small number of anthracotic macules [less than 1 mm. in diameter]" were present. When fibrous tissue was "admixed with their pigment, the fibrosis [extended] far beyond the pigment." The fibrosis had no admixed birefringement crystals, so it was not of silicotic origin. Some of the lesions were not fibrotic, but were fused walls of ruptured alveoli. (DX-172, pp. 1-2).

Dr. Naeye concluded Miner's CWP occupied less than one percent of the lung tissue available for review, which compels the conclusion that CWP could not have caused measurable abnormalities in lung function, produced any disability, nor played a role in his death, which was caused by pneumonia and centrilobar emphysema. Miner suffered from severe bronchitis, which may be caused by coal dust exposure or cigarette smoking; however, the findings of multiple published studies indicate that emphysema and bronchitis severe enough to preclude a miner from working is very rare if it occurs at all in the absence of cigarette smoking or complicated CWP. (DX-172, p. 2).

Dr. Naeye opined Miner's disability was entirely the consequence of centrilobular emphysema and chronic bronchitis rather than CWP. He noted that occupational exposure to mine dust which caused widespread fibrosis and centrilobar emphysema occurred in eastern Pennsylvania due to the steep incline of coal seams which required sand to be poured beneath rail tracks. The sand would be ground so fine that it would infiltrate areas of the lungs and kill macrophages, leading to the development of fibrosis and emphysema. This cycle rarely occurs in western Pennsylvania and the remainder of the Appalachia area where the seams of coal are not found in steep inclines. Additionally, roof bolting is primarily responsible for the development of the silica-related

fibrosis and emphysema. Thus it is rare to find such maladies in workers who were not roof-bolters. Crystals of silica are rare in Miner's lungs. (DX-172, pp. 3-4).

Based on his 22-year history of reviewing lung tissues from several thousand former coal workers, Dr. Naeye noted lungs of lifetime non-smokers rarely exhibited more than mild centrilobular emphysema, while smokers exhibited moderate to large amounts of centrilobular emphysema. However, he noted that such findings would not always differentiate smokers from non-smokers and provide a determination of the etiology of the disease.

Dr. Naeye reported that the medical literature indicates coal mine dust has a much smaller role in the genesis of centrilobular emphysema in U.S. miners than does cigarette smoking. Dr. Naeye disputed the studies on which Dr. Perper relied to conclude coal mine dust exposure is a major cause of disabling emphysema in all coal mine workers. Dr. Perper failed to consider the circumstances and conditions of the studies cited by Dr. Naeye. Specifically, the studies were prepared in different geographic areas in which miners were often compelled to continue working in mines despite the development of bronchitis, unlike in the U.S., where miners were able to quit and obtain other employment. He added Dr. Perper failed to consider the lung-damaging effects of smoking in some studies which shortened the number of years many miners were able to work in the industry. (DX-172, pp. 4-5).

Dr. Joseph F. Tomashefski, Jr., M.D.

On April 16, 2001, Meadows submitted an April 10, 2001 report by Dr. Tomashefski, a Board-certified pathologist. (DX-168).

Dr. Tomashefski reviewed Miner's medical records, reports, and autopsy report and slides. He opined Miner suffered severe, end-stage, mixed panacinar and centriacinar emphysema. Based on the presence of scattered coal macules and micronodules, Miner suffered from mild, simple CWP. The lesions of CWP were of low profusion, comprising less than three percent of the lung parenchyma on the slides. (DX-168, p. 4).

Dr. Tomashefski opined Miner's fibrotic lesions were consistent with remote organizing pneumonia. The lesions encompassed several microcondular lesions of simple CWP and "superficially resemble lesions of progressive massive fibrosis (PMF);" however, Dr. Tomashefski opined Miner did not have PMF because: (1) the scar-like lesions do not have the typical morphology of PMF as illustrated in the Pathology Standards for Coalworkers' Pneumoconiosis; (2) there were multiple other smaller

areas of scarring throughout Miner's lung which also resembled healed organizing pneumonia; (3) Miner had a history of numerous repeated episodes of acute purulent bronchitis and bronchopneumonia consistent with an interpretation that the lesions were post-inflammatory lesions; (4) localized organizing pneumonia may produce nodular lesions that may be radiographically detected; (5) black pigment is frequently concentrated in post-inflammatory scars; (6) Miner's simple CWP was "so mild that it was not detected radiographically by any experienced B-readers;" (7) "none of the many B-readers who interpreted [Miner's] chest X-rays diagnosed large opacities; (8) PMF "almost always" occurs in the setting of severe simple CWP; (8) PMF lesions typically reveal a distinctive gross appearance at autopsy, in which they appear as discrete, firm black masses at least 2.0 cm. in diameter; (9) no such lesions were described by the prosector who performed Miner's autopsy. (DX-168, pp. 4-5).

Dr. Tomashefski opined the underlying cause of Miner's death was severe emphysema coupled with acute bronchitis and bronchopneumonia. Miner's simple CWP was "too mild a degree to have been a cause of, or a contributing factor in Miner's death. The CWP would not have caused Miner any significant respiratory symptoms or impairments while alive. (DX-168, p. 5).

Dr. Tomashefski opined Miner's CWP was not a cause of his emphysema. CWP is typically associated with focal emphysema, and it is "controversial" whether CWP and coal dust exposure cause centriacinar emphysema. If simple CWP produced the latter emphysema, it would be expected that the lesions of emphysema would bear a spatial relationship to coal macules, which is not present on Miner's slides. Emphysematous legions extend well beyond the coal macules in Miner's slides. Likewise, the larger areas of scarring bore no specific spatial relationship to Miner's severe, diffuse emphysema. Thus, Dr. Tomashefski opined the larger areas of scars were incidental findings that neither caused nor contributed to Miner's death or any respiratory impairment he suffered while living. Dr. Tomashefski noted "neither simple CWP nor coal dust exposure is a cause of panacinar emphysema, the dominant pattern of emphysema in Miner's lung tissue." Cigarette smoking, on the other hand, is the most important cause of both centriacinar and panacinar emphysema. (DX-168, pp. 5-6).

Dr. Tomashefski disputed Dr. Perper's conclusions that Miner suffered from complicated CWP, which Dr. Perper indicated was a substantial cause in Miner's death. He opined Miner did not have massive fibrosis. He concluded Miner's emphysema was not caused by coal dust exposure. He noted the journal articles on which Dr. Perper relied to argue the emphysema was related to coal dust

exposure referenced British studies of miners who worked underground for at least 20 years with radiographic evidence of pneumoconiosis category one or more. Miner worked underground for only eleven years with no radiographic evidence of pneumoconiosis as interpreted by the majority of B-readers who interpreted his films. (DX-168, pp. 6-7).

Dr. Tomashefski also disputed Dr. Perper's conclusion that Miner's pneumoconiosis was misinterpreted as granulomas or cancer. The article on which Dr. Perper relied indicated only nine percent of cases without large opacities on a chest X-ray were found to have PMF by pathologic evaluation. He opined Drs. Wheeler and Scott correctly identified a 1.5 cm lesion in Miner's chest as not representing PMF. He noted that scar-like regions of Miner's size historically represent post-inflammatory scars from organized pneumonia rather than PMF. (DX-168, p. 7).

Consequently, Dr. Tomashefski opined Miner had simple CWP, not PMF. The CWP did not cause or contribute to Miner's severe emphysema, which was the underlying cause of his death. Miner's severe emphysema was caused by cigarette smoking. Id.

IV. MODIFICATION

Upon his or her own initiative, or upon the timely request of any party on grounds of a change in conditions or because of a mistake in fact, the district director may reconsider the terms of an award. 20 C.F.R. § 725.310(a). Like other procedural provisions, the Black Lung Act's modification rule is incorporated from the Longshore and Harbor Workers' Compensation Act. 30 U.S.C. § 932(a) (incorporating 33 U.S.C. § 922). The modification procedure is extraordinarily broad, especially insofar as it permits the correction of mistaken factual findings. Betty B. Coal Co. v. Director, OWCP, 194 F.3d 491 (4th Cir. 1999); Kubachka v. Windsor Power Coal Co., 11 BLR 1-171, 1-173 n. 1 (1988)(a survivor's claim filed within one year of the administrative denial of a miner's claim can be construed as a request for modification of the denial of the miner's claim).

Section 22 "vest[s] a deputy commissioner with broad ... discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." O'Keeffe v. Aerojet-General Shipyards, Inc., 404 U.S. 254, 256, 92 S.Ct. 405, 30 L.Ed.2d 424 (1971); Bethenergy Mines v. Henderson, 4 Fed.Appx. 181 (4th Cir. 2002)(unpub.)(citing Jessee v. Director, OWCP, 5 F.3d 723 (4th Cir. 1993))(the term "deputy commissioner" includes an ALJ to whom a modification request was referred); Jessee, supra at 725

(4th Cir. 1993) (the deputy commissioner may "simply rethink" a prior finding). Congress intended that this discretion be exercised whenever "desirable in order to render justice under the Act." Banks v. Chicago Grain Trimmers Ass'n., 390 U.S. 459, 464, 88 S.Ct. 1140, 20 L.Ed.2d 30 (1968).

Moreover, any mistake of fact may be corrected, including the ultimate issue of benefits eligibility. Thus, a claimant may simply allege that the ultimate fact--disability due to pneumoconiosis--was mistakenly decided, and the deputy commissioner may, if he so chooses, modify the final order on the claim. There is no need for a smoking-gun factual error, changed conditions, or startling new evidence. Jessee, supra at 724-725 (4th Cir. 1993). If the adjudicator fails to make specific findings as to whether a "mistake of fact" or "change in conditions" exists, but instead decides the claim in its entirety on the merits, it is harmless error as "the modification finding is subsumed in the administrative law judge's findings on the merits of entitlement." Motichak v. Bethenergy Mines, Inc., 17 BLR 1-14 (1992).

In the present matter, Miner's attorney timely sought a remand by the Board to seek modification. A few months after the Decision and Order Denying Benefits, Claimant filed his survivor's claim for benefits. Thereafter, Miner's counsel represented Miner's estate and Claimant requesting modification of the earlier denial of benefits at the District Director level. The modification request was referred to OALJ and is properly before the undersigned.

Under the facts presented, I find the actions and pleadings of Claimant and his counsel constitute timely and valid requests for modification of the earlier denial of benefits.[22] Miner's death is unquestionably a change in condition which would warrant review of his living miner's claim. Additional evidence generated during and after Miner's autopsy is relied on by Miner's estate as well as Claimant to argue a mistake was made in the determination of fact. Employer introduced additional X-ray interpretations and pathological reports in an attempt to challenge the evidence

[22] It must be noted that Claimant and Miner received continuing interim benefits shortly after filing their claims. Although adverse findings issued against Miner, there is no indication Miner's benefits were discontinued, nor is there any indication Claimant's benefits have been discontinued. Although there is an arguable dependent in Miner's step-son who was not identified as a dependent for the purposes of augmentation when Miner began receiving compensation benefits, no claim for underpayment has been alleged by Miner's estate or putative dependent.

submitted by Claimant. In light of the foregoing, I will consider the evidence anew.

There are two central issues which are germane to the resolution of this matter: responsible operator and entitlement, namely whether Miner's death arose, at least in part, out of coal mine employment.

Responsible Operator

Liability for the payment of benefits to eligible miners and their survivors rests with the responsible operator. 20 C.F.R. § 725.492(a)(1999).[23] An operator is defined as:

> [A]ny owner, lessee or other person who operates, controls, or supervises a coal mine or any independent contractor performing services or construction at such mine..., certain other employers, including those engaged in coal mine construction, maintenance and transportation, shall also be considered to be operators for purposes of this part....

20 C.F.R. § 725.491(a)(1999).

Under the Act, liability for the payment of benefits is imposed upon the employer with whom the miner had the most recent period of cumulative employment of not less than one year and who also meets the other requirements set out in 20 C.F.R. § 725.492(a).[24] 20 C.F.R. § 725.493(a)(1) (1999); See Snedeker v. Island Creek Coal Co., 5 BLR 1-91 (1982). It is OWCP's burden to investigate and assess liability against the proper operator. Director, OWCP v. Trace Fork Coal Co., 67 F.3d 503 (4th Cir. 1995); England v. Island Creek Coal Co., 17 BLR 1-141 (1993). The regulations call for finding the operator who meets all the

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[23] Pursuant to 20 C.F.R. § 725.2(c)(2001), the recent amendment does not apply to §§ 725.491, 725.492, 725.493, 725.494, or 725.495 for claims outstanding as of January 19, 2001.

[24] The other requirements for operator liability are that the miner's disability or death must have arisen, at least in part, out of his employment with that operator; the operator must have operated a coal mine or other facility for any period after June 30, 1973; the miner must have worked for the operator for at least one day after December 31, 1969; and the operator must be capable of providing for the payment of benefits. 20 C.F.R. 724.492(a)(1999).

criteria of a responsible operator rather than having liability revert to the Trust Fund if the first potentially responsible operator does not meet all the criteria. Armco, Inc. v. Martin, 277 F.3d 468, 476 (4th Cir. 2002).

For purposes of 20 C.F.R. § 725.493(a), one year of coal mine employment may be established by accumulating intermittent periods of coal mine employment. 20 C.F.R. § 725.492(c) (1999).[25] Regular employment may be established on the basis of any evidence presented, including the testimony of a claimant or other witnesses, and shall not be contingent upon a finding of a specific number of days of employment within a given period. However, if an operator or other employer proves that the miner was not employed by it for a period of at least 125 working days, such operator or other employer shall be determined to have established that the miner was not regularly employed for a cumulative year by such operator or employer for purposes of paragraph (a) of this section. 20 C.F.R. 725.493(b)(1999).

The Fourth Circuit concluded that the regulations require a two-step inquiry for determining operator liability. Under the first step, a court must determine whether a miner worked for an operator for "a period of one year, or partial periods totaling one year." If this requirement is met, it must then be determined whether a miner's employment during that one year was "regular," i.e., whether, during the one year, the miner was "regularly employed in or around a coal mine." To fulfill the requirement of working "regularly," the regulations provide a minimum of 125 working days. Thus, the regulations provide operator liability does not arise unless an operator employed a miner for one calendar year during which the miner regularly worked for that operator,

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[25] For the purpose of establishing the identity of a responsible operator, 20 C.F.R. § 725.492(c) (1999) provides a rebuttable presumption that, during the course of an individual's employment, such individual was regularly and continuously exposed to coal dust. To rebut the presumption, the employer must establish that there were no significant periods of coal dust exposure. Conley v. Roberts and Schaefer Coal Co., 7 BLR 1-309 (1984). The frequency of coal dust exposure must be shown to be so slight that employment with the mine operator could not have caused pneumoconiosis. Harringer v. B & G Construction Co., 4 BLR 1-542 (1982). Employer proffered no evidence to establish there were no significant periods of coal dust exposure during Miner's tenure in its coal mines. Accordingly, Miner is presumed to have been regularly and continuously exposed to coal dust during his coal mine employment for the purpose of establishing Employer as the responsible operator.

defining "regularly worked" to be a minimum of 125 days. Armco, supra at 474-475; Clark, supra.

In the present matter, Employer avers it must be dismissed from liability in favor of imposing liability upon the Trust Fund because OWCP failed to fulfill its obligation of investigating and assessing liability against the proper operator, namely Bounty, relying on Director, OWCP v. Trace Fork Coal Co., 67 F.3d 503 (4th Cir. 1995)(dismissal of an operator was proper and the matter would not be remanded to identify a new responsible operator) and Crabtree v. Bethlehem Mines Corp., 7 BLR 1-354 (1984)(the Director must resolve the responsible operator issue in a preliminary proceeding, or else proceed against all potential operators at each stage of the claim adjudication, to prevent piecemeal litigation and avoid due process concerns).

The facts of Trace Fork are inapposite to the instant matter. There, Trace Fork, a putative responsible operator presented evidence that, although two other putative responsible operators were no longer viable entities, one of them was covered by insurance. The evidence was not challenged before OALJ by the district director, who failed to appear at a formal hearing and who opposed a joint motion by the claimant and Trace Fork to remand the issue for further development of evidence on the responsible operator issue and for proper identification of the putative responsible operators. Trace Fork, 67 F.3d at 505-506.

In Trace Fork, the Fourth Circuit noted the regulations give the Director, not an operator, the power to develop evidence on the responsible operator issue, and the ALJ reasonably could require the Director to develop the evidence more fully than was done in this case. The Court added, "we note especially that Trace Fork and the miner, together, moved for a remand to determine the responsible operator, but the Director even opposed that course, and moved for remand only at the hearing before the ALJ that was conditioned on the dismissal of Trace Fork." Accordingly, the Court affirmed the Board's dismissal of Trace Fork. Id. at 508-508.

The District Director in the present matter specifically sought a remand, which was unopposed, to develop further evidence and to include the proper putative responsible operators. After the motion was granted, Bounty and Fray submitted additional employment and wage records for the relevant periods of Miner's employment. Based on the new evidence, the District Director concluded Employer was the responsible operator. Consequently, I find the District Director reasonably developed evidence in support of a determination regarding the responsible operator issue by

gathering facts after seeking a remand to properly identify the responsible operator. Therefore, the holding of Trace Fork and its implication of the holding of Crabtree are inapplicable to the facts at hand.

A. Bounty

Employer, which does not contest its regular employment of Miner for at least one year, argues Bounty is the proper responsible employer. Employer argues that a five-month gap in Miner's wage and payroll records between July 1979 and November 1979 and a three-month gap in the records between November 1979 and February 1980 reflect excused absences from work which should be included when computing one year of coal mine employment. Thus, Employer contends Claimant was employed by Bounty from December 1978 through February 1980.

Employer cites a number of cases in which periods of unemployment were included in the determination of one year of coal mine employment when miners' work-related injuries or illnesses precluded them from returning to coal mine work. See Thomas v. Bethenergy Mines, Inc., 21 BLR 1-10 (1997)(where a claimant started work, suffered a work-related back injury 68 days later on October 17, 1980 and remained on the payroll until May 17, 1982, the entire length of employment was properly considered coal mine employment); Boyd v. Island Creek Coal Co., 8 BLR 1-458 (1986)(time off for a recurring back injury was properly included where the injury was work-related and the miner remained on the payroll); Verdi v. Price River Coal Co., 6 BLR 1-1067 (1984)(an employer could not benefit from a miner's down-time where the miner was injured in a work-related accident, continued on the payroll, and maintained his seniority); Van Nest v. Consolidation Coal Co., 3 BLR 1-526 (1981)("injury time" is properly included in determining coal mine employment; however, time off with pay because of seniority is not properly included as coal mine employment); and BGL Mining Co. v. Cash, No. 97-4003 (6th Cir. Sept. 11, 1998)(a miner failed to report to work when he was sick and it was employer's policy to hold a job open when an employee was sick).

I find the cases on which Employer relies are inapposite to the present matter because there is insufficient evidence establishing Miner missed work with Bounty due to a work-related injury, nor is there any evidence Miner remained on Bounty's payroll during periods he was not working for Bounty. Employer relies on Claimant's February 1998 hearing testimony to supplement his SSA records and wage and payroll information. Claimant's hearing testimony was generally equivocal and is not helpful for a resolution of the issue. Although he testified he may have worked

for Bounty for one year, he admitted he could not recall when he started or stopped working with Bounty nor exactly how long he worked with that employer. (DX-115, pp. 51-54, 58).

Moreover, Miner completely overlooked working with Scottsdale during 1978 and admitted he could not recall the period of time between 1978 and 1980. (DX-115, p. 53). Employer argues the Social Security records indicating Miner worked for Scottsdale must be ignored as erroneous because there is no evidence Miner was employed by Scottsdale. Employer overlooks Miner's January 31, 1994 submission of his Form CM-913 Description of Coal Mine Work and Other Employment in which he specifically identified recent employment with Scottsdale. (DX-6). I find Miner's Form CM-913, which was submitted more closely in time to Miner's employment than his equivocal hearing testimony, is corroborated by the commensurate earnings revealed in his Social Security Itemized Statement of Earnings. Consequently, I find Employer's argument that the Social Security records should be ignored is without merit.

Miner also testified that there were breaks in his employment with Bounty. Miner recalled being incarcerated for "about a month" in the summer of 1979, after which time he returned to work with Bounty; however, he did not return to work with Bounty after July 1979 until his three-day return in November 1979. Miner's testimony does not otherwise account for the other time he did not work for Bounty. (DX-115, pp. 56-57). Meanwhile, Bounty's employment records specifically indicate Miner "quit" during the week of July 13, 1979. (DX-64). There is no indication or allegation that the period of time in which Miner was incarcerated was work-related. Consequently, I find Employer's argument that Miner's incarceration should be considered an excused leave of absence is without merit.

Likewise, although Miner testified a mine collapsed, there is no indication of such a collapse or its effects on the employment of its employees reported in Bounty's employment records. I find Miner's testimony that he continued moving materials for Bounty, which also paid Miner to take another miner into a mine after the alleged collapse, undermines Employer's argument that Miner was on an excused absence related to a mine collapse.

Thus, there is insufficient evidence to support a conclusion that an employment relationship existed during Miner's incarceration or that there were in fact breaks in his employment due to a collapsed mine. Consequently, I find Miner's testimony is not helpful in establishing Miner's absences from employment with

Bounty were excused leaves of absence which should be included in the calculation of coal mine employment.

Employer also argues Miner's unpaid leaves from work should be considered leaves of absences to be included in the length of coal mine employment calculation, based on the holding of Elswick v. The New River Company, 2 BLR 1-1109 (1980)(a six-week gap in employment during a calendar year did not necessitate dividing the total period of employment into partial periods since the miner's employment was not widely spaced over several calendar years and because the miner was not clearly terminated during the period). Employer's reliance on Elswick is misplaced. There, the miner's employment was generally one continuous period of employment, as the employer in that matter conceded in its brief, and there was no evidence the miner was terminated. 2 BLR at 1-1116.

In the present matter, Bounty identified three distinct periods of Miner's employment when it originally submitted its wage and personnel records on November 27, 1995. As noted above, Bounty's records clearly indicate Miner "quit" in the week of July 13, 1979, after which date Miner failed to return to work with Bounty for five months. Likewise, there is substantial evidence Miner worked with Scottsdale during 1979 which arguably indicates Miner's employment relationship with Bounty was terminated at some point during 1979. Accordingly, I find Miner's employment with Bounty was widely scattered over three calendar years. Consequently, I find his length of coal mine employment with Bounty is appropriately determined based on grouping the partial periods of his employment with Bounty.

As Employer notes, Miner's Social Security Administration (SSA) records and Bounty's wage and personnel records indicate Miner began work for Bounty on December 4, 1978. Thereafter, I find Miner continued working through the week of July 13, 1979, or 31.57 weeks. Miner returned to Bounty for three days, or one week according to payroll records, in November 1979 and three weeks in February 1980, according to payroll records and cancelled checks. Consequently, Miner worked for Bounty for 35.57 weeks, which is less than one year of coal mine employment, as determined by the District Director when the matter was remanded by OALJ for consideration of the proper responsible operator.

It is noted that Bounty could not locate wage records for March 1980. Assuming Miner worked every day after his February 26, 1980 paycheck until March 30, 1980, the day before he began work with Fray, Miner only worked another 33 days, or 4.71 weeks, which is insufficient to establish one year of coal mine employment with Bounty. Thus, assuming Miner worked the entire period after

February 26, 1980 until his employment with Fray, Miner worked 40.28 weeks, which is less than one year with Bounty.

Alternatively, Employer argues Miner's length of coal mine employment with Bounty is 1.009 years under 20 C.F.R. 725.101(a)(32)(iii)(2001), which provides for dividing a miner's yearly income from work as a miner by the coal mine industry's average daily earnings for relevant years, as reported by the Bureau of Labor Statistics (BLS). Under the regulation, an adjudication officer "may" use the calculation "if the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or if the miner's employment lasted less than a calendar year." The record does not support the conclusion that the circumstances are proper for the application of the permissive formula embodied in the regulations.

Bounty submitted its wage and payroll information from August 1978 through February 1980. The information is provided in weekly reports which account for work performed by employees according to the number of hours worked on different days during the week. The wage and payroll records identify periods of time Miner worked and periods of time he did not work. There is no evidence in the payroll records Miner was carried on the payroll during the periods he did not work. Consequently, the wage and payroll records establish breaks in Miner's employment at Bounty. Thus, the record offers substantial evidence to ascertain beginning and ending dates of Miner's employment. As noted above, the record evidence establishes, at most, a total of 40.28 weeks of Miner's coal mine employment with Bounty from December 1978 through February 1980.

Although the wage and payroll records establish less than one year of Miner's coal mine employment with Bounty, which is arguably one of the grounds to invoke the formula set forth at 20 C.F.R. 725.101(a)(32)(iii)(2001), I find that the application of the formula as Employer suggests would inappropriately overlook substantial evidence of Miner's incarceration, termination and his other employment with Scottsdale during the same period in which Employer claims Miner was employed by Bounty. Accordingly, I find the formula would not yield a reasonable approximation of Miner's employment with Bounty, which is otherwise documented in the record.

Further, assuming **arguendo** the formula Employer seeks to use is appropriately invoked to establish Miner's length of coal mine employment with Bounty, I find the facts presented in Clark v. Barnwell Coal Co., supra, are analogous to the facts at hand. There, an administrative law judge was unable to determine the beginning and ending dates of employment with an employer; however,

he was presented with the miner's Social Security Administration records for the years 1978, 1979, 1981 and 1983. He applied three different computations to arrive at a conclusion that the miner worked at least one year for the employer. First, he compared the miner's 1978 and 1979 earnings with earnings from five other coal mine operators during the same period. Second, he compared the miner's total annual earnings from coal mine employment to the coal mine industry's average annual earnings in 1983. Third, he divided the miner's yearly earnings by his hourly wage rate, assuming a five-day, forty-hour work week. Clark, supra, Slip op. at 1-4.

On appeal, the Board noted that a mere showing of 125 working days does not establish the threshold one year of coal mine employment necessary to permit the two-step inquiry to establish a responsible operator. Id. at 2 (citing Croucher v. Director, OWCP, 20 BLR 1-67, 1-72-73(1996)(en banc)(McGranery, J., concurring and dissenting); Tackett v. Cargo Mining Co., 12 BLR 1-11, 1-13 (1988)(en banc)). The Board, which noted that any reasonable method of calculation may be used to determine the length of coal mine employment, found the first method employed by the administrative law judge was unreasonable because the duration of the miner's employment with other employers was not established in the record. Id. at 4-6.

The Board then explained that the second determination used by the administrative law judge incorrectly concluded the miner worked more than one year because the BLS table relied on by the judge clearly indicates that average annual earnings are estimated based on "only 125 days of earnings." Thus, the fact that a miner's earnings exceed the average 125-day earnings reported by BLS for a given year "does not, in and of itself, establish the miner worked for one calendar year." Properly applying the averages set forth in the BLS table, the Board concluded the miner established 206 days of coal mine employment, which appeared to "undercut, not support the administrative law judge's finding of more than one year of employment" with the employer. Id. at 7.

The Director in Clark also argued that the "number of days worked must then be divided by 125 to ascertain a fractional year. The Board disagreed, finding that such a computation unreasonably collapsed the two-step analysis required in 20 C.F.R. § 725.493(b)(2000) to determine operator responsibility. Lastly, the Board determined that the third approach used by the administrative law judge was factually unsupported and unreasonable. Accordingly, the Board found insufficient evidence to support a finding that the employer employed the miner for at least one year. Id. at 7-9.

Like the facts in Clark, Employer seeks to employ a comparison of Miner's actual annual earnings with an average based on a 125-day year.[26] According to Employer's calculation, Miner established 1.009 years of coal mine employment with Bounty based on a 125-day period of earnings. Thus, following the Board's analysis in Clark, Miner established 126.13 days of coal mine employment (1.009 x 125 days = 126.13 days), which is insufficient to establish the threshold requirement of at least one calendar year of employment. Consequently, I find Bounty may not be considered the proper responsible operator.

Employer, relying on the holding of Breeding v. Colley & Colley Coal Co., argues that the Board has "held that if it is established under Section 725.101(a)(32)(2002) that the miner had at least 125 working days, then the miner is credited with one year of coal mine employment for all purposes under the Act." In Breeding, the Board considered a matter in which a miner's length of coal mine employment was determined to be 12.46 years, which was insufficient to trigger the presumption at 20 C.F.R. § 718.305. After a remand for consideration of **medical** evidence, an ALJ credited the miner with the District Director's determination of 16.75 years of coal mine employment, based on new **employment** evidence submitted by the miner's widow. Thus, the miner was entitled to the presumption. The Board affirmed. Colley & Colley Coal Co. v. Breeding, 59 Fed.Appx. 563, 564, 2003 WL 1007197 (4th Cir.).

The Fourth Circuit affirmed the Board's approval of the new determination based on the new evidence which established the miner's "employment at Wright's Super Market was actually employment in Wright's coal mine operation, not at the supermarket itself." Thus, the new evidence established the threshold requirement of working in or around coal mines for a calendar year or partial periods totaling 365 work days (366 in a leap year). Id. at 565. Consequently, Employer's contention that the Board simply affirmed a calculation of years based on a mere showing of 125 days of coal mine employment is incorrect and inconsistent with

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[26] Employer's table is entitled "Table of Coal Mine Industry Average Earnings." It is not clear who published the table, but it is noted that the annual wages correspond with the "Average Earnings of Employees in Coal Mining" table provided in Exhibit 610 of the OWCP Coal Mine (BLBA) Procedure Manual, which provides the same daily wages identified and considered in Clark, supra. (See ALJX-1). According to Employer's table, which includes no average daily wages, "a 'year' as defined here is 125 working days."

the holding of Clark, supra, which indicates such a determination collapses the two-step inquiry into one step. Accordingly, I find Employer's argument is contrary to the established jurisprudence surrounding 20 C.F.R. § 725.493(b)(2000).

In light of the foregoing, I find that, pursuant to the two-step analysis required under 20 C.F.R. § 725.493(b)(2000), the mere showing of 125 days of employment is insufficient to establish a responsible operator status. Therefore, I find Employer failed to establish Bounty employed Miner for at least one calendar year. Consequently, I find Employer was properly designated as the responsible operator.

B. Fray

By focusing solely on Bounty as the proper responsible operator, Employer implicitly agrees that Fray was properly dismissed. However, Miner's attorney argues Miner actually worked for one calendar year for Fray because Miner testified he was hospitalized for three months and twenty days following a December 1980 injury. Thus, Miner's attorney argues Miner worked from March 31, 1980 through some point in April 1981.

I find Miner's testimony is unpersuasive in establishing the dates he was hospitalized following his injury. Miner's inability to recall events in the late 1970s and early 1980s undermines the persuasiveness of his testimony regarding the duration of his hospitalization in 1981. Miner's attorney otherwise offered insufficient factual support establishing the duration of Miner's hospitalization. Meanwhile, there is no evidence Miner remained on Fray's payroll following his accident. Rather, Fray's last check to Miner was provided on January 2, 1981 with a notation indicating the check related to employment through December 20, 1980, which is generally consistent with Miner's testimony that he received payment only for prior services rendered to Fray without any payment for sick leave. Consequently, I find insufficient evidence establishing Miner maintained an employment relationship with Fray through some point in April 1981.

Further, insofar as Miner's termination date with Fray is unclear in light of Miner's testimony and the SSA records, the formula set forth at 20 C.F.R. § 725.101(a)(32)(iii) may be applied to determine Miner's length of coal mine employment. He earned a total of $13,213.53 in 1980, when the average daily wage of a miner was $87.42 according to BLS. Thus, Miner worked a total of 151.15 days for Fray during 1980 ($13,213.53 ÷ $87.42 = 151.15). In 1981, he earned a total of $902.50 when the average daily rate of a miner was $96.80 according to BLS. Thus, Miner worked an additional 9.32

days in 1981 ($902.50 ÷ 96.80 = 9.32 days). Accordingly, Miner worked a total of 160.47 days for Fray (151.15 + 9.32 = 160.47). Thus, the record fails to establish Miner worked at least one calendar year for Fray.

In light of the foregoing, I find Fray is not properly identified as the responsible operator in this matter. Consequently, I find Employer was properly designated as the responsible operator.

C. Scottsdale and Dominion

The dates of Miner's employment with Scottsdale find little supporting evidence, other than Miner's SSA records. Miner earned $2,745.60 with Scottsdale during the entire year of 1979 when the average daily rate for a miner was $87.03 according to BLS. Accordingly, Miner worked 31.55 days for Scottsdale ($2,745.60 ÷ $87.03 = 31.55 days).

The dates of Miner's employment with Dominion were estimated by that employer as March 6, 1978 through March 8, 1978, when Miner earned a total of $124.00. Accordingly, the record fails to establish Miner worked at least one calendar year for Dominion. Consequently, I find the record fails to establish that Scottsdale or Dominion may appropriately be identified as proper responsible operators.

In light of the foregoing, I find the District Director reasonably developed the record, which supports the conclusion that Employer most recently employed Miner for a period of cumulative employment of not less than one year. Consequently, potential liability for the payment of Miner's benefits and Claimant's benefits rests with Employer; however, Employer's liability hinges on the determination of whether Miner's disability or death arose, at least in part, out of his employment with Employer.

Entitlement

A. Living Miner's Claim

Miner bears the burden of establishing all of the following elements by a preponderance of the evidence: (1) he suffers from pneumoconiosis; (2) the pneumoconiosis arose out of coal mine employment; (3) he is totally disabled; and (4) his disability is caused or contributed to by pneumoconiosis. Gee v. W.G. Moore and Sons, 9 BLR 1-4 (1986)(en banc); Baumgartner v. director, OWCP, 9 BLR 1-65 (1986)(en banc); 20 C.F.R. § 725.202(d)(2)(2000).

Under the Act, the term "pneumoconiosis" is defined as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. § 902(b). The regulations explain that "pneumoconiosis" includes both medical, or "clinical", pneumoconiosis and statutory, or "legal", pneumoconiosis. 20 C.F.R. § 718.201. Clinical pneumoconiosis consists of those diseases "recognized by the medical community as pneumoconiosis," whereas legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." Id. The "legal" definition of pneumoconiosis "encompasses a wider range of afflictions than does the more restrictive medical definition of pneumoconiosis." Cornett v. Benham Coal, Inc., 227 F.3d 569 (6th Cir. 2000) (citing Kline v. Director, OWCP, 877 F.2d 1175, 1178 (3d Cir. 1989); Hobbs v. Clinchfield Coal Co., 45 F.3d 819, 821 (4th Cir. 1995)).

1. Existence of Pneumoconiosis

20 C.F.R. § 718.202 sets forth four means to determine the existence of pneumoconiosis: (1) a properly completed and reported chest X-ray; (2) a properly completed and reported biopsy or autopsy; (3) reliance upon presumptions identified in 20 C.F.R. §§ 718.304, 718.305, and 718.306; and (4) a physician's well-reasoned finding based on objective medical evidence that the miner suffers or suffered from pneumoconiosis, as defined in 20 C.F.R. § 718.201.

a. Chest X-ray Evidence

The record contains 81 readings of 42 X-rays. The August 18, 1994 X-ray is the only film that was interpreted as positive for pneumoconiosis according to four B-readers, two of which were also board-certified radiologists. (DX-26, p. 2; DX-27, pp. 2-3, 7-8, 13-14). The same film was interpreted as negative by five B-readers, four of whom were also board-certified radiolgists. (DX-41; DX-42; DX-44, pp. 2-3; DX-53, pp. 2-3). Miner's subsequent November 1996 X-rays was interpreted as negative for pneumoconiosis by three dually-qualified doctors and a B-reader, while his most recent December 1996 and January 1999 X-rays that were suitable for ILO classification were interpreted as negative for pneumoconiosis by two dually-qualified physicians. (DX-92, p. 6; DX-95, pp. 2,4; DX-96; DX-167, pp. 6-7, 10-11). Meanwhile, none of Miner's other X-rays were interpreted as positive for pneumoconiosis. Consequently, I find Claimant failed to establish the existence of pneumoconiosis by the preponderance of the X-ray evidence pursuant to 20 C.F.R. § 718.202(a)(1).

b. Autopsy Evidence

The prosector found, and all of the pathologists agree, Miner suffered from pneumoconiosis, based on the autopsy evidence that comports with 20 C.F.R. § 718.106; however the pathologists disagree on the extent of manifestation of the disease and the extent to which Miner suffered from the disease. The unanimous medical opinions that Miner suffered from pneumoconiosis are supported by Miner's autopsy evidence. Accordingly, I find the record evidence establishes the existence of pneumoconiosis.

c. Presumptions of the Existence of Pneumoconiosis

The evidence fails to establish Miner is entitled to the presumptions set forth at 20 C.F.R. § 718.305, which is not applicable to any claim filed on or after January 1, 1982, and 20 C.F.R. § 718.306, which applies when a miner dies on or before March 1, 1978 after attaining 25 years or more of coal mine employment prior to June 30, 1971.

Likewise, the record does not establish Miner is entitled to the irrebuttable presumption of total disability or death due to pneumoconiosis provided at 20 C.F.R. § 718.304. The X-ray interpretations, which were overwhelmingly reported as negative, do not establish a diagnosis of a chronic dust disease of the lung which, when diagnosed by chest X-ray, yields one or more large opacities and would be classified in Category A, B, or C under either of the three classification regimes identified in 20 C.F.R. § 718.304(a)(1) through (a)(3).

Although the irrebuttable presumption may apply, based on a diagnosis of a chronic dust disease of the lung which, when diagnosed by autopsy or biopsy, yields massive legions, I find entitlement to the presumption is not established on these facts. Of the pathologists who reviewed Miner's autopsy report and slides, Dr. Perper stands alone in his diagnosis of complicated pneumoconiosis based on his review of autopsy slides.

Dr. Perper's opinion relies on an alleged pathological "golden standard," or "the presence of pneumoconiotic fibro-anthracotic lesions of 2.0 cm. or greater." Dr. Perper conceded the large pneumoconiotic lesions he described did not include some features seen in complicated coal workers' pneumoconiosis such as central liquefaction and necrosis but concluded "the critical factor is a size of 2.0 cm. or larger pneumoconiotic lesion." His opinion is based on two areas in Miner's left upper lobe which he measured as 0.7 and 0.9 cm in diameter and one area measuring 2.5 cm. in Miner's right upper lobe.

However, the Fourth Circuit follows no "golden standard" to determine whether the irrebuttable presumption applies. See Double B Mining, Inc. v. Blankenship, 177 F.3d 240, 244 (4th Cir. 1999) (the Court remanded for an equivalency determination because evidence of lesions of 1.3 centimeters, standing alone, was insufficient to determine whether the miner had complicated pneumoconiosis).

Rather, the Fourth Circuit has explained that the irrebuttable presumption applies if "(A) an X-ray of the miner's lungs shows at least one opacity greater than one centimeter in diameter; (B) biopsy or autopsy reveals massive lesions in the lungs; or (C) a diagnosis by other means reveals a result equivalent to (A) or (B)." Eastern Associated Coal Corp. v. Director, OWCP, 220 F.3d 250, 255 (4th Cir. 2000)(citing 30 U.S.C. § 921(c)). The three methods describe a "single, objective condition." Id. Therefore, an administrative law judge must make an equivalency determination to "make certain that regardless of which diagnostic technique is used, the same underlying condition triggers the irrebuttable presumption." Double B Mining, 177 F.3d at 244. Because clause (A) sets out an entirely objective scientific standard, i.e., an opacity on an X-ray greater than one centimeter, the Fourth Circuit has held that it is the "benchmark to which evidence under the other clauses is compared." See Clinchfield Coal Co. v. Fultz, 61 Fed.Appx. 866, 869-870, 2003 WL 1735260 **3 (4th Cir. Apr. 2, 2003)(unpub.); Eastern, 220 F.3d at 256; Double B Mining, 177 F.3d at 244. Thus, massive lesions sufficient to invoke the irrebuttable presumption under clause (B) are those that, "when X-rayed . . . would show as opacities greater than one centimeter." Fultz, 61 Fed.Appx. at 870, 2003 WL 1735260 at **3 (citing Eastern, 220 F.3d at 258).

In determining the validity of claims under this part, all relevant evidence shall be considered. 30 U.S.C. § 923(b). A claimant is entitled to the benefit of the irrebuttable presumption not because he has provided a single piece of relevant evidence, but because he has a "chronic dust disease of the lung," commonly known as complicated pneumoconiosis. To make such a determination, OWCP necessarily must look at all of the relevant evidence presented. See Lester v. Director, OWCP, 993 F.2d 1143, 1145 (4th Cir.1993); Island Creek Coal Co. v. Compton, 211 F.3d 203, 208-09 (4th Cir.2000).

Evidence under one prong can diminish the probative force of evidence under another prong if the two forms of evidence conflict. Yet, "a single piece of relevant evidence," can support an ALJ's finding that the irrebuttable presumption was successfully invoked if that piece of evidence outweighs conflicting evidence in the

record. Lester, 993 F.2d at 1145 Thus, even where some x-ray evidence indicates opacities that would satisfy the requirements of prong (A), if other x-ray evidence is available or if evidence is available that is relevant to an analysis under prong (B) or prong (C), then all of the evidence must be considered and evaluated to determine whether the evidence as a whole indicates a condition of such severity that it would produce opacities greater than one centimeter in diameter on an x-ray. Double B Mining, 177 F.3d at 243-44.

Of course, if the x-ray evidence vividly displays opacities exceeding one centimeter, its probative force is not reduced because the evidence under some other prong is inconclusive or less vivid. Instead, the x-ray evidence can lose force only if other evidence affirmatively shows that the opacities are not there or are not what they seem to be, perhaps because of an intervening pathology, some technical problem with the equipment used, or incompetence of the reader. Eastern, 220 F.3d at 256.

In Eastern, the Fourth Circuit affirmed an ALJ's determination that the facts established lesions were revealed in an autopsy which would result in opacities greater than one centimeter on an X-ray. There, an X-ray was reviewed by eight doctors, seven of whom read the film as positive for complicated pneumoconiosis in that it showed one or more opacities larger than one centimeter in diameter. The eighth reviewer observed "extensive pulmonary densities consistent with pneumoconiosis," but did not elaborate by discussing the presence or absence of large opacities or other indications of complicated pneumoconiosis. 220 F.3d at 253. An autopsy report included "[p]rominent pneumoconiotic nodules ... scattered all over the pulmonary parenchyma. These range[d] in size from 0.5 cm. to 1 cm." The prosector diagnosed a number of pulmonary ailments and concluded the miner's main disease was "extensive obstructive pulmonary disease which was caused mainly by panlobular macronodular pneumoconiosis." 220 F.3d at 254. Although the ALJ incorrectly concluded the miner was entitled to the presumption under part (B) of the analysis, the autopsy evidence did not undermine his conclusion that the miner was entitled to the presumption under part (A), which was affirmed. 220 F.3d at 257.

In the present matter, the overwhelming number of B-readers which examined Miner's films, found no evidence of any pneumoconiosis, complicated or otherwise, despite periodic findings of an opacity greater than one centimeter in Miner's upper left lobe. Those opinions which found evidence of pneumoconiosis were rebutted by dually-qualified readers. As noted by Dr. Perper, the prosector reported no massive lesions in Miner's lungs.

Accordingly, I find the record does not support a finding that Miner established entitlement to the irrebuttable presumption based on his X-rays.

Moreover, although an opacity in Miner's upper left lobe was at times indicated as greater than one centimeter on Miner's X-rays, the opacity was generally considered unrelated to pneumoconiosis by the B-readers and board-certified radiologists who opined the opacity was related to a number of causes, including possible scarring, cancer, or granuloma. The autopsy evidence does not undermine their conclusions. Dr. Perper conceded the lesions failed to include evidence ordinarily expected with complicated pneumoconiosis. I find the opinions of Drs. Naeye and Tomashefski, which are consistent with Dr. Perper's findings of scarring emphysema and a lack of evidence of complicated pneumoconiosis, persuasive and cogent in establishing Miner's lesions were not the result of complicated pneumoconiosis. Accordingly, I find insufficient evidence to conclude Miner suffered from complicated pneumoconiosis based on a reported opacity in his X-rays.

Further, there is insufficient evidence that the 0.7 and 0.9 cm. lesions of Miner's left upper lobe would have showed up as 1.0 cm. on an X-ray. Likewise, there is no evidence the 2.5 cm. lesion in Miner's right upper lobe would have showed up as 1.0 cm. on an X-ray. See Double B Mining, 177 F.3d at 244 (nodules are generally larger on autopsy examination than they appear on a chest radiograph); Fultz, 61 Fed.Appx at 871-872, 2003 WL 1735260 **4 (the Court vacated an award of benefits where there was insufficient evidence to support an ALJ's determination that lesions would have shown as greater than one centimeter on an X-ray). Without more, I am constrained from concluding Miner's lesions would appear as one centimeter on an X-ray. Consequently, I find the preponderance of medical evidence fails to establish Miner is entitled to the irrebuttable presumption based on his autopsy evidence.

2. Whether Pneumoconiosis arose from Coal Mine Employment and Length of Coal Mine Employment

Having found Miner had pneumoconiosis, it must be determined whether his disability arose, at least in part, out of coal mine employment. 20 C.F.R. § 718.203(a). If a miner who suffers from pneumoconiosis was employed for ten years or more in one or more coal mines, there is a rebuttable presumption that pneumoconiosis arose out of such employment. 20 C.F.R. § 718.203(b). Otherwise, the claimant must provide competent evidence to establish the relationship between pneumoconiosis and coal mine employment. 20 C.F.R. § 718.203(c).

Employer argues that the determination of Miner's length of coal mine employment must be determined consistently for the purposes of calculating length of coal mine employment and for the purposes of establishing a responsible operator.[27] In Armco, supra, the Court explained that a "year" means "a period of one calendar year (365 days, or 366 days if one of the days is February 29) . . . during which the miner worked in or around a coal mine or mines for at least 125 'working days.'" The Court found that the later revisions were not binding but informed its analysis of "what the earlier, less clearly written regulations were intended to mean." 277 F.3d 475-476.

Likewise, in its comments to the recent changes to the regulations, the Department "concluded that a single definition with general applicability was appropriate since the calculation of the length of a miner's employment is the same inquiry under both §§ 718.301 [length of coal mine employment] and 725.493(b) [responsible operator]." Consequently, I find Employer's argument is persuasive and has merit.

The prior Decision and Order did not explain the basis of a determination of Miner's length of coal mine employment. (DX-121, p. 3). Miner's SSA records do not reveal starting and ending dates of his employment during the years he worked from 1961 through 1981. Further, Miner testified that he worked for companies unrelated to mining at times prior to 1970, which is supported by his SSA records. After 1970, Miner's actual income appears to reflect regular employment for one employer during various years in the coal mine industry. His income may be compared to the average daily wages for employees in the coal mine industry:

Year	Miner's Actual Annual Wages	Average Daily Wage	Estimated Days of Coal Mine Dust Exposure
1961	$343.95	$21.16	16.25
1966	$478.00	$27.51	17.38
1967	$507.00	$29.30	17.86

[27] Although Employer did not explicitly allege a mistake in fact regarding the prior finding by Judge Miller of Miner's length of coal mine employment, it has implicitly raised Miner's length of coal mine employment as an issue for consideration in its argument that Miner established less than eleven years of coal mine employment.

1968	$268.00	$30.41	8.81
1969	$101.63	$34.09	2.98
1970	$5,548.90	$38.22	145.18
1971	$7,840.66	$40.07	195.67
1972	$9,000.00	$44.61	201.75
1973	$10,800.00	$47.19	228.86
1974	$12,687.86	$48.64	260.85
1975	$13,555.22	$59.24	228.82
1976	$12,714.46	$64.07	198.45
1977	$14,729.44	$71.90	204.86
1978	$11,377.71	$80.31	141.67
1979	$8,906.11	$87.03	102.33
1980	$15,714.36	$87.42	179.76
1981	$902.50	$96.80	9.32

According to Miner's SSA records, he worked one calendar year from 1970 through 1971 with Oquin Belcher Coal Company, Inc. Thereafter he worked from 1971 through 1976 for Jewell Ridge Coal Corporation, which represents five calendar years. For the calendar years 1976 through 1978, Miner worked for Employer. Thus, Miner established eight calendar years in which he was employed in or around coal mines for more than 125 days. Although Miner failed to establish at least one calendar year of coal mine employment from 1961 through 1969 and from 1979 through 1981, he has established a total of 354.69 days of coal mine employment for those periods of time. (16.25 + 17.38 + 17.86 + 8.81 + 2.98 + 102.33 + 179.76 + 9.32 = 354.69), or .97 of one year (354.69 ÷ 365 = .97).

In light of the foregoing, I find Miner established 8.97 years of coal mine employment. Consequently, the previous finding that Miner established eleven years of coal mine employment is modified to reflect 8.97 years of established coal mine employment.

Although the established length of Miner's coal mine employment does not entitle him to a rebuttable presumption that his pneumoconiosis arose out of his coal mine employment, I find Miner provided competent evidence to establish the relationship between pneumoconiosis and coal mine employment. Miner described

the “very heavy” coal dust to which he was exposed while moving cables and pulling levers related to cutting machines underground. (DX-115, pp. 39-40, 44-45). His testimony that the entirety of his coal mine employment was underground is uncontroverted. (DX-115, pp. 31-32).

Miner’s testimony supports the conclusions offered by Drs. Iosif, Forehand, Thakkar, Perper and Castle that Miner suffered CWP related to his coal mine employment. Although the opinions of those doctors could have offered a better description of the length of Miner’s coal mine employment, I find they are persuasive in consideration of Miner’s autopsy report which indicated the presence of CWP, coal macules and microcondular lesions. Since Miner’s autopsy, the physicians of record have primarily addressed the relationship of Miner’s CWP to his condition rather than the relationship of his CWP to his coal mine employment. I thus find insufficient evidence to rebut the medical opinions of record indicating Miner’s CWP arose from his coal mine employment.

Accordingly, based on Miner’s testimony and the opinions of Drs. Forehand, Iosif, Thakkar, Perper, and Castle, I find Miner established that his CWP arose from his 8.97-year history of underground coal mine employment.

3. Total Disability

In the absence of the application of the irrebuttable presumption found at 20 C.F.R. § 718.304, total disability may be established by pulmonary function tests, arterial blood-gas tests or medical evidence of cor pulmonale with right-sided congestive heart failure. In the event the aforementioned methods do not establish total disability, total disability may be established by an acceptable medical opinion. 20 C.F.R. § 718.204.

a. Pulmonary Function Studies

In light of the positive results of Miner’s pulmonary function studies, I find the record supports the previous finding that Claimant established total disability pursuant to 20 C.F.R. § 718.204(c)(1). Accordingly, as previously found in the prior Decision and Order, Miner was totally disabled based on his pulmonary function studies.

b. Arterial Blood Gas Studies

I find no reason to depart from the previous finding that Claimant failed to present sufficient proof of total disability based on §718.204(c)(2), based on the majority of non-qualifying

arterial blood gas results which exceed the values identified in Appendix C to part 718 and Miner's most recent non-qualifying results obtained in January 1999. Consequently, the findings in the previous Decision and Order concerning Miner's disability based on results obtained in his arterial blood gas studies remain undisturbed.

4. Whether Miner's Pneumoconiosis Caused or Contributed to his Disability

I find no reason to disturb the previous determination that the medical reports of record failed to establish Miner's disability arose, at least in part, from his coal mine employment. The previous Decision and Order thoughtfully and carefully considered the medical reports which were assigned appropriate probative value. The earlier determination is buttressed by the recent autopsy report, death certificate, discharge summary, X-ray interpretations, and the pathological reports of Drs. Perper, Naeye and Tomashefski.

Miner's attorney argues Dr. Iosif's recent opinion that Miner's pneumoconiosis caused or contributed to his condition should be given great weight as the opinion of a treating physician. I find Dr. Iosif's medical opinions are not as persuasive as the multiple medical opinions of record which include better-reasoned explanations for miner's condition. See Consolidation Coal Co. v. Director, OWCP [Held], 314 F.3d 184 (4th Cir. 2002) (the court held that it was improper to accord "great weight" to the opinion of a physician merely because he treated Claimant and examined him each year over the past ten years and added, "neither [the Fourth Circuit] nor the Benefits Review Board has ever fashioned either a requirement or a presumption that treating or examining physicians' opinions be given greater weight than the opinions of other expert physicians)(citing Grizzle v. Pickands Mather and Co., 994 F.2d 1093 (4th Cir. 1993)); Griffith v. Director, OWCP, 49 F.3d 164 (6th Cir. 1995); Consolidation Coal Co. v. Director, OWCP, 54 F.3d 434, 438 (7th Cir. 1995) (disparaging a "mechanical determination" favoring a treating physician when the evidence is equally weighted).

Dr. Iosif noted Miner's coal mine experience, yet failed to identify or discuss the effects, if any, of Miner's smoking history, which continued for nearly fifteen years after Miner's coal mine employment ended. Further, Dr. Iosif apparently overstated Miner's coal mine employment in forming a conclusion. Moreover, Dr. Iosif admitted in his August 5, 1997 report that he was unaware of the basis for the original determination that Miner suffered from CWP. Nevertheless, Dr. Iosif opined Miner suffered

from the disease in his most recent opinion without further explanation. His most recent opinion conflicts with his earlier entry on Miner's death certificate and in Miner's discharge summary from his final hospitalization. Consequently, I find Dr. Iosif failed to adequately explain the medical basis for his opinions.

I find the pathological opinions of record were formed after consideration of autopsy evidence which was not present prior to Miner's death and are most persuasive. I find the opinions of Drs. Tomashefski and Naeye are supported by the opinions of Drs. McSharry and Tuteur and more persuasive than the opinion of Dr. Perper, whose opinion is unique in the record.

Dr. Perper, who acknowledged cigarette smoking may cause Miner's condition, concluded Miner's coal mine employment caused his condition; however, Dr. Perper failed to explain why Miner's cigarette smoking, which continued for fourteen years after Miner's retirement from coal mine employment, was not a cause of his condition. Although he cited one study which indicated pneumoconiosis may be misinterpreted on a radiographic examination, Dr. Perper failed to sufficiently explain why the B-readers and board-certified radiologists in this matter would have missed the evidence in the vast majority of 81 interpretations of 42 X-rays.

On the other hand, Drs. Naeye and Tomashefski, who agreed Miner suffered simple pneumoconiosis, persuasively opined Miner's condition was not caused or contributed to by his pneumoconiosis. Their opinions, which were based on a review of Miner's medical records and autopsy evidence, thoughtfully considered the effects simple pneumoconiosis, smoking and coal mine employment had on the etiology of Miner's condition. Their opinions are well-reasoned, corroborative and consistent in establishing Miner's simple coal workers' pneumoconiosis would not have caused Miner any significant respiratory symptoms, measurable abnormalities nor impairments while alive, nor could it have been a contributing factor in Miner's death, which was caused by pneumonia, emphysema and bronchitis related to cigarette smoking.

It should be noted that the opinions of Drs. Naeye and Tomashefski are not in contravention of the holdings of Warth v. Southern Ohio Coal Co., 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995)(a physician's assumption that COPD was not encompassed within the definition of pneumoconiosis failed to provide legitimate reasons for precluding dust exposure in coal mine employment as a cause or aggravation of that disease); See Stiltner v. Island Creek Coal Co., 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996)(an opinion that a miner would "likely" exhibit a restrictive impairment in addition to COPD was not inimical to the Act); Lane v. Union Carbide Corp.,

105 F.3d 166 (4th Cir. 1997)(an opinion that simple pneumoconiosis would "not be expected" to cause a pulmonary impairment was not hostile to the Act); and Thorn v. Itmann Coal Co., 3 F.3d 713 (4th Cir. 1995)(an opinion that simple pneumoconiosis does not cause total disability "as a rule" was inimical to the Act).

Neither physician categorically denied disabling effects of pneumoconiosis nor completely forestalled the possibility of the existence of pneumoconiosis in the absence of other factors. Although Dr. Tomashefski noted studies which indicate pneumoconiosis is not a progressive disease, he did not render his opinion based on those studies, which were offered as a supplement to his other conclusions that were well-reasoned and based on objective medical evidence of record.

Likewise, Dr. Naeye's opinion that lungs of lifetime non-smokers "rarely" exhibited more than mild centrilobular emphysema, while smokers exhibited moderate to large amounts of centrilobular emphysema was accompanied with the proviso that such findings would not always differentiate smokers from non-smokers or provide a determination of the etiology of the disease. Dr. Naeye's indication that findings of multiple published studies indicate that emphysema and bronchitis severe enough to preclude a miner from working is "very rare if it occurs at all" in the absence of cigarette smoking or complicated CWP does not preclude a finding of emphysema or bronchitis in the absence of cigarette smoking or complicated CWP.

Similarly, Dr. Tuteur, who supported the opinions of Drs. Naeye and Tomashefski, reiterated numerous times that the findings Miner displayed might be the result of coal mine dust exposure and did not completely foreclose the likelihood that CWP might cause Miner's condition. Consequently, I find his explanation that coal mine dust exposure was unlikely a cause of Miner's condition is not in contravention of Warth and Stiltner.

On the other hand, I find the opinions of Drs. Castle, McSharry, Sargent and Fino regarding the etiology of Miner's condition do not comply with Warth. The opinions of Drs. Castle and Sargent consistently conclude that [CWP] causes airway obstruction and obstructive lung disease "in the presence of a significant radiographic abnormality" appears to indicate Miner may not establish his condition was caused by CWP unless a significant radiographic abnormality is present. Likewise, Dr. McSharry's conclusion that "nothing about any of [Miner's] hospitalizations suggests [CWP]" because Miner was prescribed a mechanical device, which is "the type frequently seen in patients with severe obstructive pulmonary disease," but commonly used for the treatment

of maladies related to cigarette smoking, forecloses the likelihood that CWP may cause obstructive pulmonary disorders requiring the use of mechanical equipment.

Similarly, Dr. McSharry's opinion that oral corticosteroid therapy and bronchodilators are "standard therapies for obstructive pulmonary disease, but have no role in [CWP]," which is "not at all affected" by the treatments removes the possibility that maladies related to coal mine dust exposure might respond to the therapies. Drs. Sargent and Fino likewise opined there is no evidence, namely a positive X-ray or a restrictive impairment which was unaffected by the use of a bronchodilator, to support a finding of a respiratory impairment due to coal dust exposure. Consequently, the physicians' opinions preclude a finding that a miner may suffer from an occupationally acquired disability due to CWP if positive results are obtained through corticosteroid therapy and bronchodilators. Accordingly, I accord the opinions of Drs. Castle, McSharry, Sargent and Fino less probative value than the opinions of Drs. Naeye, Tomashefski and Tuteur.

Accordingly, I find the opinions of Drs. Naeye and Tomashefski, which are buttressed by the opinion of Dr. Tuteur, are persuasive and cogent in establishing Miner's disability did not arise, at least in part, from his coal mine employment. Moreover, their opinions are consistent with and buttress the findings in the previous Decision and Order, which thoughtfully considered the remaining medical reports of record. Therefore, I find Miner failed to establish his disability arose, at least in part, from his coal mine employment.

5. Conclusion

In light of the foregoing, I find Miner failed to establish all of the elements necessary for entitlement to benefits under the Act. Accordingly, his claim is hereby **DENIED**.

B. Survivor's Claim

A survivor's claim filed after January 1, 1982, must meet four elements for entitlement. The claimant bears the burden of proving these elements by a preponderance of evidence. If the claimant fails to prove any one of these elements, the claim for benefits must be denied. See Gee v. W. G. Moore and Sons, 9 BLR 1-4 (1986); Roberts v. Bethlehem Mines Corporation, 8 BLR 1-211 (1985). The four elements are: (1) the claimant is an eligible survivor of the deceased miner; (2) the coal miner suffered from pneumoconiosis; (3) the coal miner's pneumoconiosis arose out of coal mine

employment; and (4) the coal miner's death was due to coal workers' pneumoconiosis.

1. Eligible Survivor

The record indicates Claimant never married and reached 18 years of age in July 2002, but continues to receive full-time education at Randall High School in Amarillo, Texas, where he expects to graduate in May 2004. Consequently, the record supports a finding that Claimant is an eligible survivor.

2. Whether Miner's Death was Due to Coal Workers' Pneumoconiosis

The preponderance of the record evidence establishes the existence of pneumoconiosis and its relationship to Miner's coal mine employment, as noted above. Consequently, for Claimant to succeed in establishing entitlement to benefits under the Act, he must establish Miner's death was due to pneumoconiosis.

For a survivor's claim filed on or after January 1, 1982, the regulations provide four means by which to establish a coal miner's death was due to pneumoconiosis:

1. Competent medical evidence establishes the death was caused by pneumoconiosis, or

2. Pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, or

3. Death was caused by complications of pneumoconiosis, or

4. The presumption in 20 C.F.R. § 718.304 regarding complicated pneumoconiosis applies.

See 20 C.F.R. § 718.205(c)(1); 20 C.F.R. § 718.205(c)(2); 20 C.F.R. § 718.205(c)(3).

A survivor may not receive benefits if the coal miner's death was caused by traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless evidence establishes that pneumoconiosis was a substantially contributing cause of death. 20 C.F.R. § 718.205(c)(4).

Concerning the second means of establishing death due to pneumoconiosis, the BRB and Federal Courts of Appeal have provided guidance regarding "substantially contributing cause or factor."

The BRB stated that, under the provisions of §718.205(c), death will be considered to be due to pneumoconiosis where the cause of death is significantly related to or significantly aggravated by pneumoconiosis. Foreman v. Peabody Coal Co., 8 BLR 1-371, 1-374 (1985). The Fourth Circuit follows the proposition that any condition that "hastens the miner's death" is a substantially contributing cause of death for purposes of § 718.205. See Shuff v. Cedar Coal Co., 967 F.2d 9787 (4th Cir. 1992). Consequently, if pneumoconiosis actually hastened a coal miner's death, then it is a substantially contributing cause within the meaning of the regulations.

As discussed above, I find the medical opinions of Drs. Iosif and Perper are not as well-reasoned and factually supported as the medical opinions of Drs. Naeye and Tomashefski, who persuasively opined Miner's death was not caused or hastened by the presence of pneumoconiosis. I find Miner's principal cause of death was respiratory failure due to emphysema, pneumonia and bronchitis, pursuant to the preponderance of pathological opinions which are supported by Miner's autopsy report and slides as well as Miner's discharge summary and death certificate.

Likewise, the opinions of Drs. Naeye, Tomashefski and Tuteur are persuasive in establishing that Miner's coal workers' pneumoconiosis was insufficient to cause measurable abnormalities while living or otherwise contribute to or hasten Miner's death. Accordingly, I find Claimant failed to establish Miner's death due to complications from cigarette smoking was hastened or substantially contributed to by his coal workers' pneumoconiosis.

In light of the foregoing, I find Claimant failed to present competent medical evidence which establishes Miner's death was caused by clinical or legal pneumoconiosis. Likewise, the record fails to support a finding that the irrebuttable presumption at 20 C.F.R. § 718.304 applies, as previously discussed. Consequently, I find Claimant failed to establish Miner's death was due to pneumoconiosis. Therefore, Claimant's survivor's claim is hereby **DENIED**.

ORDER

In light of the foregoing findings of fact and conclusions of law, Miner's claim for modification is hereby **DENIED** and Claimant's claim for entitlement to survivor's benefits is hereby **DENIED**.

ORDERED this 1st day of October, 2003, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS. Pursuant to 20 C.F.R. Section 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this Decision and Order by filing a notice of appeal with the Benefits Review Board at P. O. Box 37601, Washington, DC 20013-7601. A copy of a notice of appeal must also be served on Donald S. Shire, Esq., Associate Solicitor for Black Lung Benefits. His address is Frances Perkins Building, Room N-2117, 200 Constitution Avenue, N.W., Washington, D.C. 20210.